

Meeting Date: 1/13/09

# AGENDA REPORT

City of Santa Clara, California

Agenda Item # 4B-2



**Date:** January 5, 2009  
**To:** City Manager for Council Action  
**From:** John C. Roukema, Director of Electric Utility  
**Subject:** Approval of Fiber Lease Agreement with Nvidia Corporation for Long Term Dark Fiber Optics

## EXECUTIVE SUMMARY:

In 1995, Council approved the construction of a backbone fiber optics network for the Electric Department and for General Government communication needs that included added capacity for the leasing of fiber and the provision of other services to third parties. As of July 1, 2000, the backbone fiber optics network was substantially completed and notice of completion was delivered to the first dark fiber lessee.

Staff has negotiated a long-term fiber optic lease with Nvidia Corporation (Nvidia). The lease is for an irrevocable right to use for ten years with expected revenues in excess of \$30,384 annually. While the majority of the Agreement will be maintained as public record, specific term and pricing provisions are confidential and are available for council review in the Office of the City Clerk.

## ADVANTAGES AND DISADVANTAGES OF ISSUE:

This lease allows Silicon Valley Power (SVP) to continue to maintain fiber for communication requirements necessary for reliable system operation while producing revenue. The lease will not require additional investment in the fiber optic backbone network, but will require operational and administrative attention. These requirements will be met by existing personnel and contracted services.

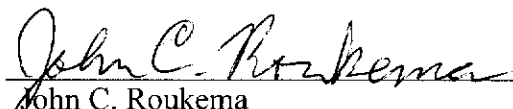
## ECONOMIC/FISCAL IMPACT:

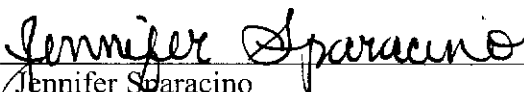
Overall, revenue from the lease of fiber (including the Nvidia lease) is estimated to produce net present value benefits between \$8-\$14 million after operational and marketing expenses. The lease with Nvidia is expected to contribute more than \$303,840 over its term to help offset Electric Utility expenses. No additional allocation of funds is required to execute the Nvidia lease.

## RECOMMENDATION:

That Council approve, and authorize the City Manager to execute, the Fiber Lease Agreement with Nvidia Corporation for long term dark fiber optics.

APPROVED:

  
John C. Roukema  
Director of Electric Utility

  
Jennifer Sparacino  
City Manager

### *Documents Related to this Report:*

- 1) *Fiber Lease Agreement with Nvidia Corporation*

**FIBER LEASE AGREEMENT BY AND BETWEEN  
THE CITY OF SANTA CLARA, CALIFORNIA  
AND  
NVIDIA CORPORATION**

**PREAMBLE**

This lease agreement, ("Agreement"), is made and entered into in the City of Santa Clara, County of Santa Clara, State of California on this \_\_\_\_ day of \_\_\_\_\_, 2008, ("Effective Date"), by and between the City of Santa Clara, California, a chartered California municipal corporation doing business as Silicon Valley Power (the "City") and between NVIDIA Corporation, a Delaware corporation, ("Lessee") with its principal place of business located at 2701 San Tomas Expressway, Santa Clara, CA 95050. The City and Lessee may be referred to herein individually as a "Party" or collectively as the "Parties" or the "Parties to this Agreement".

**RECITALS**

Whereas:

- A. In the exercise of the powers granted under Article 11, Section 9 of the California Constitution, the Charter of the City of Santa Clara, the Santa Clara Municipal Code and other laws, the government of the City of Santa Clara has constructed a Fiber Optic Infrastructure within the jurisdictional boundaries of the City. The Fiber Optic Infrastructure is to facilitate the application of state-of-the-art telecommunications services to accommodate the requirements of the Electric Department and potentially other City agencies and municipal institutions. Title to the Fiber Optic Infrastructure, and every part thereof, is vested exclusively in the City.
- B. The Fiber Optic Infrastructure has been designed with fiber strand capacity (dark fiber) available for leasing or licensing ("Leaseable Fiber(s)"). The City is to construct, install, operate, maintain, repair, disconnect, replace and remove facilities, cable and other equipment necessary for the Fiber Optic Infrastructure.
- C. Lessee is now duly authorized, licensed or otherwise qualified to operate as required by applicable state or federal laws ("Qualified Party") and that it intends to use Leaseable Fibers from the Fiber Optic Infrastructure for lawful purposes.

## AGREEMENT PROVISIONS

In consideration of the Recitals above and the mutual promises contained in this Agreement, the Parties agree as follows:

### ARTICLE 1. GRANT AND SCOPE OF LEASE

- 1.1 The Parties to this Agreement agree and attest to the truth and accuracy of the provisions contained in the Preamble and Recitals set forth above. The provisions of the Preamble and Recitals are hereby incorporated and made a part of this Agreement by this reference. The Parties agree that this Agreement has been entered into, at least in part, in consideration of the provisions contained in the Preamble and Recitals, as well as the provisions contained in the balance of this Agreement.
- 1.2 **Authority.** The City of Santa Clara is a charter city and a municipal corporation, drawing its authority from Article 11 of the California State Constitution. Article 11 and the charter adopted by the City in 1951, allow the City to, *inter alia*, establish, purchase, and operate public works to furnish inhabitants with light, water, power, heat, transportation, or means of communication. The City owns the Fiber Optic Infrastructure as a public works operated by its electric utility, Silicon Valley Power.
- 1.3 **Fiber Optic Infrastructure.** The City has constructed a Fiber Optic Infrastructure located either underground in the City conduits or overhead on electric utility poles in the general route set forth in Exhibit 2. Any future expansions to the Fiber Optic Infrastructure owned by the City may be included in the definition of "Leasable Fibers".
- 1.4 **Non-Discrimination.** The City, as a public entity, may not unduly discriminate against any Lessee or potential Lessee in leasing Leasable Fiber or additional Leaseable Fiber. The City shall, in good faith, make all commercially reasonable efforts to ensure that each Lessee pays a price per fiber mile equivalent to other Lessees, based upon the number of Leased Fibers, total fiber miles and length of Term. The City shall, in good faith, make all commercially reasonable efforts to require equivalent Adequate Assurance (Article 10) from each Lessee based upon the total Lease Payment due by that Lessee.
- 1.5 **Grant.** Subject to the provisions of this Agreement and Exhibits 1 through 11, inclusive which are incorporated by this reference as though set forth in full, the

City grants to Lessee, and Lessee accepts from the City, the right and privilege ("Lease") to use certain of the Leaseable Fibers ("Leased Fiber(s)"), Attachment Points, Backbone Extensions, Service Drops, Private Property Access, Lateral Extensions, Building Entrances (as set forth in Exhibits 3 and 4 and referred to herein collectively as "Leased Infrastructure") and any additional Leased Infrastructure later specifically leased to Lessee by an executed Exhibit 10. ("Additional Leased Infrastructure").

**1.5 Leased Fibers.** This Lease establishes the right of Lessee to use the Leased Infrastructure described in Exhibits 3, 4 and executed versions of Exhibit 10.

1.5.1 The Leased Fibers under this Agreement are set forth in Exhibits 3, 4 and executed versions of Exhibit 10.

1.5.2 **Additional Leased Fibers.** In the future, the City may lease to Lessee additional Leaseable Fibers requested by Lessee during the remainder of the Term of this Agreement, if capacity is available and the following conditions are met:

1.5.2.1 Lessee shall be granted a Lease of additional Leaseable Fibers so long as the capacity remains available and Lessee is not in material breach of this Agreement. If Lessee is currently, or in the past has been, in material breach of this Agreement, then it is within the discretion of the Director of the Electric Utility to allow or deny the lease of additional Leaseable Fiber to Lessee: provided, however, that the Director of the Electric Utility shall not unreasonably deny the lease of additional Leaseable Fiber to Lessee.

1.5.2.2 The Director of the Electric Utility ("Director") has authority delegated by the City Council to agree to the lease of additional Leaseable Fibers to Lessee. Lessee shall make a request for additional Leaseable Fibers by submitting the Request Form attached as Exhibit 10, executed by a person authorized to bind Lessee. The price, terms and conditions of leasing additional Leaseable Fiber shall be negotiated in good faith and agreed upon by the Parties. Upon mutual agreement of the Parties as to the price, terms and conditions, Exhibit 10 shall be revised and executed by an Authorized Representative of Lessee and the Director, and an amendment to this Agreement shall have occurred without the necessity of further action by either Party. All other terms and conditions set forth in this Agreement will apply to the Additional Leased Fibers. The Lease as to the Additional Leased Fibers shall commence on the Date of Delivery thereof and shall terminate at the end of the specified Term.

1.6 **Attachment Points.** Lessee shall have use of, and access to, the Leased Fibers through Attachment Points listed on Exhibit 4 or subsequently added by an executed Exhibit 10. All Attachment Points are an integral part of the Fiber Optic Infrastructure and are the property of the City.

1.6.1 **Cost of Attachment Points.** The City will provide Lessee with the Attachment Points listed on Exhibit 4 and with the Attachment Points listed on any executed versions of Exhibit 10 at the cost set forth in Article 3 "Lease Payment and Other Fees—Attachment Points".

1.6.2 **Lessee's Infrastructure Unavailable.** If the City has been requested to perform construction of Leased Infrastructure, and if at the time the City completes that construction Lessee is not prepared to complete the connection, then Lessee shall be responsible for splicing its fiber to the thirty (30) foot fiber drop provided by the City as agreed in paragraph 5.2.2. If Lessee desires City to provide fiber drop cable in excess of the thirty foot drop, or if Lessee desires City to splice the drop to Lessee's Infrastructure, then when applicable Lessee will pay the fees specified in Article 3 "Lease Payment and Other Fees—Attachment Points".

1.6.3 **Splicing.** If Lessee provides cable from Lessee's Infrastructure to the City in a timely manner (i.e. other than as stated in paragraph 1.6.2), then upon Lessee's request, the City shall splice Lessee-provided fiber cable at designated City-owned Attachment Points. The City shall be responsible for pulling Lessee's fiber cable, and splicing Lessee's fiber strand within the City-owned Fiber Optic Infrastructure. Ownership of fiber on the City's side of the Demarcation Points shall be vested with the City. When applicable, Lessee shall pay the City the fees specified in Article 3 "Lease Payment and Other Fees—Attachment Points"

1.6.4 **Splicing on City's Side of Demarcation.** Splicing of fibers located within the Fiber Optic Infrastructure, if required to accommodate Lessee, shall be performed only by the City's personnel or designated independent contractors, or both. The City shall assume responsibility for the construction taken on behalf of Lessee in accordance with Exhibit 7. When applicable, Lessee shall pay to the City the fees specified in Article 3 "Lease Payment and Other Fees—Attachment Points".

- 1.6.5 **Additional Attachment Points.** If, after execution of this Agreement by the Parties, Lessee desires to attach to other Attachment Points not listed in Exhibit 4 ("Additional Attachment Points"), then Lessee shall submit a request through a Request Form (attached hereto as Exhibit 10) executed by a person authorized to bind Lessee ("Authorized Representative"). The City shall cooperate in accommodating Lessee's requests for Additional Attachment Points so long as adequate space exists to attach Lessee to that Attachment Point, the request to be attached to Additional Attachment Points is not unreasonable, and the Additional Attachment Points do not materially and adversely affect the Fiber Optic Infrastructure. Authority to agree to Additional Attachment Points for Lessee is delegated to the Director by the City Council. The terms and conditions of leasing Additional Attachment Points shall be negotiated and agreed upon by the Parties; the price for Additional Attachment Points is set forth in Article 3. If the Director and the Authorized Representative execute Exhibit 10, then an amendment to this Agreement has occurred; Exhibit 4 may be modified to reflect the Additional Attachment Points. All other terms and conditions set forth in this Agreement will apply to the Additional Attachment Points.
- 1.7 **Backbone Extensions.** The City will install the Backbone Extensions at the locations shown in Exhibit 4 or any executed Exhibit 10, and shall make its commercially reasonable efforts to complete construction by the estimated completion dates set forth in that Exhibit.
- 1.7.1 If the City has the monetary resources and manpower to construct the requested Backbone Extension at the time it is requested by Lessee, then there shall be no charge to Lessee for engineering or construction services. Lessee shall be billed for added fiber miles at the rate set forth in Exhibit 5.
- 1.7.2 If the Backbone Extension is one that the City had not anticipated building at the time Lessee requests it, or if the City does not have the monetary resources or manpower to construct the Backbone Extension at the time it is requested by Lessee, then Lessee shall pay the amount set forth in Article 3 "Lease Payment and Other Fees—Backbone Extensions".
- 1.7.3 If Lessee desires Additional Backbone Extensions, then Lessee shall submit a request through a Request Form (attached hereto as Exhibit 10)

executed by an Authorized Representative. The terms, conditions and estimated delivery dates for the construction and leasing of Additional Backbone Extensions shall be negotiated in good faith and mutually agreed upon by the Parties. The Director may have authority delegated by the City Council to agree to Additional Backbone Extensions, but on occasion, approval of the City Council may be required for expenditure of funds. If the Director and the Authorized Representative execute Exhibit 10, then City agrees to build the Additional Backbone Extensions, and an amendment to this Agreement has occurred.

- 1.8 **Service Drops.** The City will install the Service Drops at the locations shown in Exhibit 4 or any executed Exhibit 10, and shall make its commercially reasonable efforts to complete construction by the estimated completion dates set forth in that Exhibit. Upon installation of such Service Drops by City and acceptance of such Service Drops by Lessee in accordance with Article 4, Lessee shall be billed for additional fiber miles at the rate per fiber mile set forth in Exhibit 5 and shall be charged for construction and engineering costs based on the terms set forth in Exhibit 4 or an executed Exhibit 10.
  - 1.8.1 The City charges Lessee for construction of Service Drops, which amount is set forth in Article 3 "Lease Payment and Other Fees—Service Drops" based on terms set forth in Exhibit 4 or an executed Exhibit 10.
  - 1.8.2 If Lessee desires Additional Service Drops, Lessee shall submit a request through a Request Form (attached hereto as Exhibit 10) executed by an Authorized Representative. The terms, conditions and estimated delivery dates of building or leasing Additional Service Drops shall be negotiated and agreed upon by the Parties and set forth in Exhibit 10. If the Director and the Authorized Representative execute Exhibit 10, then an amendment to this Agreement has occurred. All other terms and conditions set forth in this Agreement will apply to the Additional Service Drops.
- 1.9 **Private Property Access and/or Lateral Extensions.** The City will install the Private Property Access or Lateral Extension at the locations shown in Exhibit 4 or any executed Exhibit 10, and shall make its commercially reasonable efforts to complete construction by the estimated completion dates set forth in that Exhibit. Lessee is billed for added fiber miles at the rate per fiber mile set forth in Exhibit 5 and shall be charged for construction and engineering costs based on the terms set forth in Exhibit 4 or an executed Exhibit 10.

- 1.9.1 If the Private Property Access or Lateral Extension is to a location where other potential Lessees desire to run fiber, and if the City has the monetary resources, and manpower to construct the requested Private Property Access or Lateral Extension at the time it is requested by Lessee, then there shall be no charge to Lessee for engineering or construction services.
- 1.9.2 If the Private Property Access or Lateral Extension is one that no other Lessee desires, then it is treated as a Service Drop. If the Private Property Access or Lateral Extension is to a location where other potential Lessees desire to run fiber, but the City had not anticipated building that Private Property Access or Lateral Extension at the time Lessee requests it, or if the City does not have the monetary resources or manpower to construct the Private Property Access or Lateral Extension at the time it is requested by Lessee, then Lessee shall pay the amount set forth in Article 3 "Lease Payment and Other Fees—Private Property Access". The price per fiber mile associated with the Private Property Access or Lateral Extension is set forth in Exhibit 5 and the cost of engineering and construction of a Private Property Access or Lateral Extension is set forth in Exhibit 4 or an executed Exhibit 10.
- 1.9.3 If Lessee desires Additional Private Property Access (or Lateral Extension), then Lessee shall submit a request through a Request Form (attached hereto as Exhibit 10) executed an Authorized Representative. The terms, conditions and delivery dates for the construction and leasing of Additional Private Property Access or Lateral Extension shall be negotiated and mutually agreed upon by the Parties. The Director may have authority delegated by the City Council to agree to Additional Private Property Access, but on occasion, approval of the City Council may be required for expenditure of funds. If the Director and the Authorized Representative execute Exhibit 10, then City agrees to perform the Additional Private Property Access or Lateral Extension, and an amendment to this Agreement has occurred.
- 1.10 **Building Entrances and City Point-of Presence.** The City will deliver Lessee to the Building Entrances or City Point-of Presence at the locations so designated on Exhibit 4 or any executed Exhibit 10.
- 1.10.1 Some City Attachment Points are at Building Entrances and so long as the City has space available in its rack at the Building Entrance, City will agree to provide Lessee with that Building Entrance. However, the



number of Lessee's fibers to be connected at the specific Building Entrance shall be set forth in Exhibit 4 or 11. Unless negotiated and agreed upon between City and Lessee, Lessee shall not be entitled to demand connection of all Leased Fibers passing by that Building Entrance to that Building Entrance. The City has a finite number of connections allowed in each Building Entrance and numerous Lessees. The number of Lessee's fibers to be connected at a Building Entrance is a negotiated number.

1.10.2 Some City Attachment Points are not in Building Entrances but are located in meet-me-boxes located on the private property near the building. Unless the City expressly agrees in writing to negotiate a Right-of-Entry which results in a Building Entrance, the City shall only deliver Lessee to the meet-me-box at that City Attachment Points. Lessee shall be responsible for negotiating the Right-of-Entry and securing the Building Entrance on its own behalf.

1.10.3 Where no Building Entrance or Attachment Points exists at the location Lessee desires to have its fiber, then the City shall determine (i) whether sufficient other Lessees desire to locate at that Attachment Points such that engineering and construction costs should be the City's or if the build should be treated as a Service Drop and (ii) whether the Lessee or the City shall be responsible for securing the Right-of-Entry.

1.10.4 If the City agrees to deliver Lessee to a new Building Entrance and the City assumes the obligation of securing the Right-of-Entry, then all completion dates for connections to Building Entrances are estimated completion dates and shall not be guaranteed by the City.

1.10.5 Lessee is always responsible for obtaining a Service Agreement on its own behalf enabling Lessee to have Lessee's Infrastructure located within a private building.

1.11 **No Exclusivity.** Nothing in this Agreement is to limit the City's right of use of, or right to lease or license Attachment Points, Backbone Extensions, Service Drops, Private Property Access, Building Entrances, conduit or the remaining City Fiber or Leaseable Fiber not leased in this Agreement to others.

- 1.12 **Limitations.** This is a Lease for the use of the Leased Infrastructure only, subject to the terms and conditions herein. City is not transferring or granting to Lessee any other interest or estate in the Leased Fibers, the Fiber Optic Infrastructure, Attachment Points, Backbone Extensions, Service Drops, Private Property Access, Building Entrances, conduit or any other property interest, including any fee, easement, or any franchise rights. This Agreement is not a contract for electric service. Electric service may be provided to Lessee by application to the Municipal Services Division and pursuant to the Municipal Services Rules and Regulations. This is not a franchise agreement for providing cable services. A franchise agreement may be obtained through the City Attorney's Office.
- 1.13 **No Agency.** Lessee is not City's agent and shall have no authority, express or implied, to act as agent of City or any of its departments for any purpose. The City is not Lessee's agent and shall have no authority, express or implied, to act as agent of Lessee for any purpose.

## **ARTICLE 2. TERM**

- 2.1 **Effective Date of Agreement.** This Agreement shall be binding on the Parties beginning on the Effective Date.
- 2.2 **Term of Lease.** The Term of this Lease is the Initial Term plus any exercised Renewal Terms. The Initial Term is defined in Exhibit 5.
- 2.3 **Renewal Terms.** Provided Lessee is not in default of any of the material terms or provisions of this Lease (including but not limited to payment of all fees and charges) beyond the applicable cure period, Lessee may renew this Lease for up to two Renewal Terms. Each Renewal Term is for five (5) years. The manner in which to set price for a Renewal Term is set forth in Article 3, "Lease Payment and Other Fees". To request a Renewal Term, Lessee shall:
- 2.3.1 Deliver to the Director, a written request to extend the Term as early as one hundred and eighty (180) calendar days, and no later than ninety (90) calendar days, prior to the expiration of the then effective term, Initial, Renewal or otherwise. (Time-is-of-the-essence may be invoked by the City with respect to this notification period.)
- 2.3.2 For any request to renew this Lease the Parties shall mutually agree upon a rate that is consistent with market prices at that time. For any request to renew this Lease beyond two Renewal Terms, the Parties shall also agree upon the Term length. A Renewal Term shall not be unreasonably withheld.

### ARTICLE 3. LEASE PAYMENT AND OTHER FEES

3.1 Lessee shall pay to the City in United States dollars the Lease Payment as calculated in Exhibit 5 for the Lease and use of the Leased Infrastructure, as well as any other applicable fees as set forth below. Beginning on the second anniversary of the Effective Date and on each subsequent anniversary date, the price per fiber mile will be adjusted to reflect annual changes in the Consumer Price Index. The base for computing the Price Inflation Adjustment (PIA) shall be the most current Consumer Price Index for *all Urban Consumers* for the San Francisco Oakland San Jose CMSA, published by the United States Department of Labor, Bureau of Labor Statistics available on December 1 of each year

3.2 **General Criteria.** The Lease Payment is based on:

3.2.1 The total number of Leased Fibers leased by Lessee as shown in Exhibit 3;

3.2.2 The length of the Leased Fibers (fiber miles) to the nearest foot as shown on Exhibit 3; and

3.2.3 Availability of the Leased Fiber. Lease charges for the Leased Fiber are to accrue from the Date of Delivery in the quarter the Leased Fiber is delivered and for the number of calendar days following the Date of Delivery that the Leased Fiber is available to Lessee (see 3.2.4). In any subsequent quarter, the Leased Fiber is deemed available to Lessee for 91 calendar days. Notwithstanding the foregoing, no Lease Payment shall be due for any fibers specifically designated as not being in compliance with the Fiber Specifications set forth in Exhibit 7 hereto unless and until same shall have been found to have been in compliance in accordance with the provisions of Article 4 below. The Rate Schedule is set forth in Exhibit 5.

3.2.4 Prorated Lease Payment. If a Delivery Date occurs in the middle of a quarter, the Lease Payment is prorated. The Lease Payment for any quarter shall be based on the criteria set forth in paragraph 3.2 of the Agreement, in accordance with the following calculation:

$$\text{Lease Payment} = \frac{\sum [\text{Length of Segments} \times \text{No. of Fibers} \times \text{Rate} \times 3 \times [\text{Days of availability}/91]]}{\text{Segments}}$$

3.3 **Lease Payment.** The Lease Payment for any quarter shall be based on the criteria set forth in paragraph 3.2, in accordance with the calculation set forth in Exhibit 5. Charges for the first Lease Payment shall commence to accrue on the Date of Delivery.

3.3.1 **Due Date of Lease Payments.** Except in instances in which Lessee has elected the pre-payment option (paragraph 3.4 below) Lease Payments shall be paid on a quarterly basis. Lease Payments are due and payable on or before the commencement of a quarter, to wit: before January 1, April 1, July 1, and October 1. For the Date of Delivery for any Leased Fiber that has been delivered to Lessee, Lessee shall pre-pay for use of that Leased Fiber for the coming quarter. For any Leased Fiber delivered to Lessee for which the Date of Delivery occurs after the commencement of a quarter, Lessee shall have use of that Leased Fiber without pre-payment and shall pay the pro-rated amount at the end of the quarter in which the Leased Fiber was delivered, as well as the pre-payment amount for the next quarter.

3.3.2 The City shall send an invoice dated thirty (30) calendar days prior to the end of the quarter, to Lessee as a reminder of the total amount of the quarterly Lease Payment due thirty (30) calendar days later. If Lessee does not receive such an invoice, it is still bound to pay the quarterly Lease Payment in a timely manner, which amount is set forth in Exhibit 5. Lessee shall make each quarterly payment to the City under this Agreement in a timely manner via wire transfer to:

Bank of America  
City of Santa Clara  
A/C 1436-380211  
ABA# 026-009-593

3.3.3 If the Lease Payment is not paid as required herein, simple interest on unpaid, undisputed amounts of the Lease Payment shall accrue, until paid, at one percent (1%) per month.

3.4 **Pre-Payment Option.** Lessee may choose to pre-pay the entire Initial Term of the Lease and receive a discounted price upon execution of the Lease. Lessee may also elect, at any time in the future, to prepay any remaining balance of the Annual Payments due under the Initial Term, or any Renewal Term, of this Agreement by sending a written notification to City. Within ten (10) business days of receipt of such notice, City shall respond by sending Lessee an invoice for the net present value of the remaining Annual Payments, which net present value shall be determined by discounting the sum of the remaining future payments due under the Initial Term or the Renewal Term, as applicable, of this Agreement by fifteen percent (15%) per year. The amount due shall reflect the annual price per fiber mile prevailing at the time of prepayment. Lessee shall pay such invoice within thirty (30) days of receipt thereof, or shall forfeit the election to prepay the remainder of the Initial Term or the applicable Renewal Term. Any Lessee

electing to pre-pay the Lease shall be required to pay a Maintenance Fee as set forth in paragraph 3.5 Below.

- 3.5 **Maintenance Fees.** For Lessees making quarterly lease payments pursuant to paragraph 3.3 above, no Maintenance Fee is charged. For Lessees electing to pre-pay the Lease (paragraph 3.4 above), Lessee will make annual payments of ten dollars (\$10) per fiber mile per month for ongoing fiber maintenance and administration. Payment will be due annually, at the beginning of each calendar year. Lessee shall make this annual payment to the City in a timely manner via wire transfer to:

Bank of America  
City of Santa Clara  
A/C 1436-380211  
ABA# 026-009-593

The City shall send an invoice to Lessee dated thirty (30) calendar days prior to the first of the year as a reminder of the amount due. If the Lease Payment is not paid as required herein, simple interest on unpaid, undisputed amounts of the Lease Payment shall accrue, until paid, at one percent (1%) per month.

- 3.6 **Lease Payment for Renewal Term.** At the cessation of the Initial Term Lessee may elect to renew this Lease ("Renewal Term") as set forth in section 2.3 for that Renewal Term and at the Rate Schedule for Renewal Term as set forth in Exhibit 5.

3.6.1 **Price Inflation Adjustment.** During any Renewal Period, the Rate shall be adjusted annually for price inflation ("PIA") on January 1<sup>st</sup>, for each successive year after the first year of the Renewal Term. The base for computing the PIA shall be the most current Consumer Price Index for *All Urban Consumers* for the San Francisco-Oakland-San Jose CMSA, published by the United States Department of Labor, Bureau of Labor Statistics available on December 1 of each year.

3.6.2 **Market Rate Adjustment.** The Rate Schedule shall be adjusted at the commencement of each Renewal Term to reflect prevailing market conditions at that time. The change in the Rate in the first year of any such rate adjustment period shall not exceed plus or minus 20 percent relative to the Rate charged in the immediately preceding 5-year period. For a rate adjustment to take effect, the parties shall mutually agree upon the terms and rates.

- 3.7 **Construction Costs and Engineering Fees.** The City charges for engineering services and construction of infrastructure under certain circumstances as set forth below. Unless otherwise specified below, payment for those services shall be invoiced upon completion by the City, and payment of that invoice is due thirty

(30) days from the date on the invoice. If payment of the invoice is not paid on the Due Date, then simple interest on the unpaid, undisputed amounts shall accrue until paid, at one percent (1%) per month. If Lessee fails to pay any invoice, then the City may subject the applicant to the Notice & Cure Rights of the Lessee, then the provisions of Article 11.1.2 apply and the City may draw against the Adequate Assurance posted by Lessee pursuant to Article 10.

3.7.1 **Preliminary Engineering Fees.** Subsequent to execution of this Agreement and delivery of the Adequate Assurance, but prior to the Date of Delivery of the Leased Fiber and prior to the first Due Date of a Lease Payment for that fiber, it is anticipated that SVP will be required to provide to Lessee Preliminary Engineering Services. SVP will perform these Preliminary Engineering Services upon deposit of the Adequate Assurance. SVP shall render an invoice every thirty (30) days detailing the hours of Preliminary Engineering Services performed for Lessee at a City's actual costs. Lessee shall pay for the Engineering Services performed, which payment is due within thirty (30) days of date on the invoice.

3.7.2 **Construction of the Configuration.** In general, the City does not charge Lessee for the engineering services or construction costs of splicing Lessee's basic ring configuration. However, if Lessee does not make its first Lease Payment or this Agreement is otherwise terminated due to no fault of the City prior to the Due Date of the first Lease Payment, then Lessee shall pay SVP for Construction of the Configuration of Lessee's Leased Fiber (as set forth in Exhibits 3 and 4). Lessee shall be liable for any attorney fees expended by SVP in attempting to recover any fees that are the subject of this Paragraph. This attorney fees provision does not apply to any other sections of this Agreement.

3.7.3 **Attachment Points.** If an Attachment Point currently exists on the Backbone and if space is available for Lessee to attach at that location, then the charge to Lessee is the cost of splicing plus fifteen percent (15%). If an Attachment Point is not available and if the City agrees to construct an Attachment Point at the location desired by Lessee, then upon installation of such Attachment Point by City and Acceptance of such Attachment Point by Lessee in accordance with Article 4, Lessee shall pay all the costs of engineering services and costs of construction of that Attachment Point, plus fifteen percent (15%). As other Lessees attach to that Attachment Point, Lessee shall be reimbursed the Reimbursable Amount.

3.7.4 **Backbone Extensions.** Assuming the City has adequate resources available, the City may agree to construct a Backbone Extension at City's expense upon a request made by Lessee pursuant to Exhibit 10. If the City does not then have adequate resources to construct the Backbone

Extension immediately upon Lessee's request, City may nonetheless agree to construct the Backbone Extension at Lessee's expense. Upon installation of such Backbone Extension by City and Acceptance of such Backbone Extension by Lessee in accordance with Article 4, Lessee shall pay all the costs of engineering services and costs of construction of that Backbone Extension, plus fifteen percent (15%). As other Lessees lease fiber on that Backbone Extension, Lessee shall be reimbursed the Reimbursable Amount.

- 3.7.5 **Service Drop.** Lessee shall pay to City the cost of engineering services and the cost of construction plus fifteen percent (15%) of any Service Drop. Though, by definition, it is not anticipated that any other lessee will desire to use that Service Drop, if a subsequent lessee does desire Leased Fiber in or to the Service Drop, this Lessee shall be reimbursed the Reimbursable Amount.
- 3.7.6 **Private Property Access and/or Lateral Extensions.** If a Private Property Access or Lateral Extension currently exists from the Backbone to a Building Entrance and if space is available on that Private Property Access or Lateral Extension, then the charge to Lessee is the cost of splicing plus fifteen percent (15%). If a Private Property Access or Lateral Extension is not available and if the City agrees to construct a Private Property Access or Lateral Extension at the location desired by Lessee, the City may treat that Private Property Access or Lateral Extension as a Backbone Extension or Service Drop, depending upon whether other potential lessees desire to go to that building. If the City chooses to treat the Private Property Access or Lateral Extension as a Backbone Extension, then City shall pay the costs of construction. If the City chooses to treat the Private Property Access or Lateral Extension as a Service Drop, then Lessee shall pay all the costs of engineering services and costs of construction of that Private Property Access or Lateral Extension, plus fifteen percent (15%). As other Lessees enter that Private Property Access or Lateral Extension, Lessee shall be reimbursed the Reimbursable Amount. Lessee may cancel this Lease as to a Private Property Access or Lateral Extension upon thirty (30) days written notice to the City, so long as Lessee has paid City any applicable engineering or construction fees. No Termination fee or other charge will be assessed by City to Lessee for termination of the Private Property Access or Lateral Extension.
- 3.7.7 **Building Entrances.** The City has obtained Building Entrance to certain privately-owned locations. If the City has fiber available to a Building Entrance, Lessee shall be charged the cost of connecting Lessee to that Building Entrance plus fifteen percent (15%) and any fees charged to the City

by the building owner or tenant, which are directly attributable to Lessee's connection at that Building Entrance. If a Building Entrance is not available and if the City believes that other lessees would desire entrance at that location, then the City may agree to negotiate an entrance agreement and construct to and connect to the Building Entrance at the location desired by Lessee. City shall pay the costs of negotiating the entrance agreement and construction to the Building Entrance. Lessee is responsible for obtaining permission to locate Lessee Infrastructure in the building. Lessee may cancel this Lease to a Building Entrance upon thirty (30) days written notice to the City, so long as Lessee has paid City any applicable engineering, construction fees or connection fees. No Termination fee or other charge will be assessed by City to Lessee for termination of the Building Entrance.

**3.8 Third Party Charges.** Lessee will reimburse the City for charges assessed or imposed on the City by third parties, including but not limited to any fees for Building Entrances directly attributable to Lessee's entrance into that building, which may be incurred by the City in accommodating Lessee's Infrastructure requirements within the City, or as required by law relating to this Agreement. City will advise Lessee, in advance, of potential or anticipated costs imposed by third parties for accommodating Lessee's Infrastructure and which are directly attributable to Lessee, to the extent City is aware of those charges in advance and can obtain an estimate from that third party. If Lessee does not agree to the charge imposed by the third party, then Lessee shall be responsible for negotiating with that third party and shall hold the City harmless from any claim of delay in completing the subject work due to Lessee's negotiations of the third party charges. If Lessee chooses not to pay the third party charges, then City shall not perform the work requested by Lessee.

**3.9 Taxes and Franchise Fees.** None of the Lease Payments charged to Lessee pursuant to this Agreement includes any tax or franchise fee charged by any governmental entity. Lessee shall be solely responsible for paying any and all taxes, franchise fee or assessments by any governmental entity related to the Leased Infrastructure, if any, when due.

**3.9.1** The City represents that currently, there is no tax imposed by the City that would be levied on Lessee associated with this Agreement. The City does charge a franchise fee for use of fiber to operate as a cable service, and Lessee must enter into a franchise agreement with City in order to provide those services within the City of Santa Clara. Providing cable services without a franchise agreement constitutes a material breach of this Agreement.



3.9.2 Notice is hereby given that the property interest vested in Lessee may create a possessory interest which entities (other than the City) may deem subject to property taxation and Lessee may be subject to payment of property taxes therefore.

3.9.3 Lessee shall be solely responsible for opposing, protesting, appealing or challenging any tax or franchise fee imposed or asserted by any entity.

#### **ARTICLE 4. CONSTRUCTION AND ACCEPTANCE OF LEASED FIBER**

4.1 **Notice of Completion.** City has constructed and shall continue to cause to be constructed the Fiber Optic Infrastructure. City shall notify Lessee in writing upon the completion of construction of the configuration of all of the Leased Infrastructure as set forth in Exhibits 3 and 4 attached hereto ("Notice of Completion"). Unless the Parties otherwise agree, the first Notice of Completion shall not be sent to Lessee until all items listed in Exhibits 3 and 4 have been completed by City. Charges for any Leased Fiber shall commence on the Date of Delivery of such Leased Fiber. Thereafter, if Lessee requests pursuant to an executed Exhibit 10, that City construct and/or lease to Lessee additional Leaseable Fiber, Attachment Points, Backbone Extensions, Service Drops, Private Property Access, Lateral Extensions, or Building Entrances, the City shall provide Lessee with a Notice of Completion as soon as construction is complete. The City shall use its commercially reasonable efforts to complete construction of the Leased Infrastructure as set forth in Exhibits 3 and 4, or any future Leased Fiber, Attachment Points, Backbone Extensions, Service Drops, Private Property Access, lateral Extensions, or Building Entrances added by an executed Exhibit 10. Upon the completion of construction of the foregoing, the City shall perform testing in accordance with standards and procedures enumerated in Exhibit 7.

4.2 **New Construction.** Upon the completion of construction of any Leased Fiber, Attachment Point, Backbone Extension, Service Drop, Private Property Access, Lateral Extension, or Building Entrance, the City shall promptly conduct construction tests, at its sole cost and expense, in order to verify that the particular item meets the Performance Specifications set forth in Exhibit 7 ("Post-Construction Testing"). The results of such tests shall be provided to Lessee concurrently with the Notice of Completion, at no cost to Lessee.

4.3 **Existing Fiber Optic Infrastructure.** If any Leased Fiber, Attachment Point, Backbone Extension, Service Drop, Private Property Access, Lateral Extension, or Building Entrance is to be provided from the Fiber Optic Infrastructure that is not newly constructed, the City shall perform verification testing to verify that the item to be leased meets the Performance Specifications set forth in Exhibit 7 ("Verification Testing"). The results of such tests shall be provided to Lessee, within five (5) business days of completion thereof, at no cost to Lessee.

- 4.4 **Lessee's Acceptance Testing.** Lessee may conduct its own testing of the Leased Infrastructure or of additional Leased Fibers, Attachment Points, Backbone Extensions, Private Property Access, Service Drops, lateral Extensions, or Building Entrances added by an executed Exhibit 10 upon receipt of the Notice of Completion or Verification Testing as to any of those items in order to verify that the Leased Infrastructure or individual item meets the Performance Specifications set forth in Exhibit 7 ("Acceptance Testing"). Lessee is solely responsible for ensuring that Lessee has installed the necessary Lessee Infrastructure or obtained required entrance agreements to perform its own Acceptance Testing.
- 4.4.1 The time for Lessee performing Acceptance Testing shall not be extended because Lessee has failed to install Lessee Infrastructure or obtain entrance into private locations (unless City has specifically assumed, in writing, that responsibility for gaining that entrance into a Building Entrance or Private Property Access). Lessee shall complete Acceptance Testing within thirty (30) calendar days of the later of receipt of (a) the Notice of Completion as to the Leased Infrastructure or any additional Leased Fibers, Attachment Points, Backbone Extensions, Private Property Access, Service Drops, Lateral Extensions, or Building Entrances added by an executed Exhibit 10 or (b) receipt of the results of the City's Post-Construction or Verification Tests as to the same.
- 4.4.2 The City will cooperate in conducting such tests, and participate in joint testing, if requested, in each case at Lessee's sole cost and expense. Lessee shall provide City with no less than forty-eight (48) hours notice of the time it desires City to participate in joint testing.
- 4.4.3 If Lessee shall have failed to complete Acceptance Testing within the time period set forth in this Article, it shall be deemed to have waived its rights to conduct Acceptance Testing as to the Leased Fibers, Attachment Points, Backbone Extensions, Private Property Access, Service Drops, Lateral Extensions, or Building Entrances that are the subject of the Notice of Completion and said items shall be deemed accepted by Lessee upon expiration of such thirty-day period;
- 4.4.4 If Lessee chooses to perform Acceptance Testing, it may do so and then notify the City within thirty (30) calendar days of the later of the date of receipt of (a) the Notice of Completion as to the Leased Infrastructure or any Leased Fiber Attachment Point, Backbone Extension, Private Property Access, Service Drop, Lateral Extension, or Building Entrance added by an executed Exhibit 10 or (b) the results of the City's Post-Construction or Verification Tests as to the same. Lessee shall indicate in a Notice of Acceptance/Rejection (Exhibit 6) what portion of the Leased Infrastructure (Exhibit 3 and 4) or which of the Leased Fibers, Attachment Point, Backbone Extension, Private Property Access, Service Drop,

Lateral Extension, or Building Entrance added by an executed Exhibit 10, failed to pass the Acceptance Testing, and the reason therefore.

- 4.5 **Notice of Rejection.** In the event Lessee delivers a Notice of Rejection to City, the City shall use its commercially reasonable efforts to correct or repair Leased Fibers, Attachment Points, Backbone Extensions, Private Property Access, Service Drops, Lateral Extensions, or Building Entrances that are not in compliance. Thereafter, City shall again give Lessee a Notice of Completion with respect to the particular item previously indicated in Lessee's Notice of Rejection as not in compliance. The foregoing procedure shall apply again and successively thereafter until City has remedied all defects or failures that are not in conformance with the Performance Specifications of Exhibit 7. Once compliance with the Performance Specifications set forth in Exhibit 7 is achieved and demonstrated by the City, Lessee shall within ten (10) business days execute a Notice of Acceptance with respect to the accepted Leased Infrastructure. Lessee shall not unreasonably withhold acceptance.
- 4.6 **Use of Fiber.** Unless otherwise agreed by the Parties, Lessee may not use any part of the Leased Infrastructure as set forth in Exhibits 3 and 4 until acceptance of the entire Leased Infrastructure has been received by the City from Lessee.
- 4.6.1 If the majority of the Leased Infrastructure can be completed by City by a certain date, but certain Backbone Extensions, Service Drops, Private Property Access, Lateral Extensions, or Building Entrances cannot be completed until a much later date, the Parties can mutually agree that the City can issue one Notice of Completion for the majority of the Leased Infrastructure, and later Notices of Completion for the Backbone Extensions, Service Drops, Private Property Access, Lateral Extensions, or Building Entrances that cannot be delivered at the same time. If the Parties so agree, that agreement shall be set forth in writing, preferably in Exhibit 4. Upon issuance of a Notice of Completion for the initial portion of the Leased Infrastructure, Lessee and City shall be subject to all the requirements of paragraphs 4.1 through 4.5. Upon receipt by the City of the Notice of Acceptance as to the agreed portion of the Leased Infrastructure, Lessee may use that portion of the Leased Infrastructure and its Lease Payment for that portion of the Leased Infrastructure delivered, is due.
- 4.6.2 Lessee may not use Leased Infrastructure to provide cable services unless and until it has obtained a franchise from the City of Santa Clara. The City reserves the right to require a franchise for any application that may later be allowed by changes in federal or state law.
- 4.7 **Date of Delivery.** Upon the use of by Lessee of any Leased Fiber or upon receipt by the City of an executed Notice of Acceptance, the Leased Infrastructure that is the subject of the Notice of Acceptance shall be deemed to have been ready for

immediate use and interconnection by Lessee to Lessee's Infrastructure as of the Date of Delivery. The earliest of the date on which Lessee first uses the Leased Fiber, or the date that the City sent the Notice of Completion to Lessee (which was subsequently executed by Lessee as accepted) shall be the "Date of Delivery" of the affected Leased Infrastructure and payment shall be due.

- 4.8 **As-Built Drawings.** The City provides as-built drawings to Lessees only for Service Drops constructed for that Lessee. The City will not share detailed as-built drawings of its Fiber Optic Infrastructure with the public, nor will it provide those as-builts to its Lessees. A general configuration of Lessee's route is attached hereto as Exhibit 2

## **ARTICLE 5. LESSEE'S INTERFACE WITH CITY'S INFRASTRUCTURE**

### **5.1 Lessee's Fiber Route.**

- 5.1.1 Any time Lessee applies for a permit for additional fiber routes within the City boundaries for interconnection to the Fiber Optic Infrastructure, Lessee shall, in addition to any other required City permit processes, submit an "Engineering Information Form", substantially in the form of Exhibit 8 to the person identified in Exhibit 9. Lessee shall also provide interconnection status information as may be requested by the Director from time to time. To the extent Lessee deems any such information is Confidential Information, it shall comply with the provisions of Article 22 of this Agreement. Following completion of the installation of Lessee's Infrastructure and fiber route within the City, Lessee shall, within thirty (30) calendar days of completion and to the extent necessary, identify the location of Lessee's Infrastructure located within the City, providing the City with information accurately reflecting the actual location of Lessee's Infrastructure and fiber route configurations located within the City ("As-Built Infrastructure"). Lessee's As-Built Infrastructure will be treated as Confidential Information, will be labeled as such and shall be treated as set forth in Article 22 below. Lessee's As-Built Infrastructure shall be used solely by the City for purposes of joint testing and trouble diagnosis (e.g., to determine trouble origination as City or Lessee's facility problem).
- 5.1.2 From time to time either Party may request that the other Party perform installation work on its behalf as an adjunct to installation work occurring and related to their respective Infrastructures. Each Party will cooperate with the other in accommodating such requests, but is not obligated to do so if it is deemed to introduce delays or complications to the planned work. Any costs incurred by one Party on behalf of the other Party shall be documented and then reimbursed by the Party receiving the benefit, with the exception of personnel time or overhead unless each Party has explicitly agreed that personnel time be included and that time exceeds eight (8) hours.

- 5.2 **Lessee's Infrastructure.** Lessee shall assume ownership, installation, and maintenance responsibility for Lessee's Infrastructure beginning at least one foot from City-owned splice cases, pull boxes, or other City-owned structures.
- 5.2.1 At each Attachment Point, the City shall provide a capped, stubbed-out conduit, one-foot in length, from the Fiber Optic Infrastructure to the Demarcation Point.
- 5.2.2 At each capped, stubbed-out conduit, City shall provide a fiber drop cable in the amount of thirty (30) feet. In accordance with paragraph 1.6.2 Lessee, and not City, shall be responsible for splicing its own fiber to that thirty-foot drop, unless the Parties agree otherwise in writing
- 5.2.3 Lessee shall be responsible for installation and interconnection of fiber within structures located on Lessee's side of the Demarcation Points, which structures are the sole responsibility of Lessee.
- 5.2.4 Installation of conduit, fiber, splice cases and other structures on Lessee's side of the Demarcation Points shall be the responsibility of Lessee, and title shall be vested with Lessee, if and as appropriate.
- 5.3 **Lessee Covenants.** Except as expressly authorized by applicable laws or this Agreement, in the exercise and performance of its rights and obligations under this Agreement, Lessee covenants and agrees:
- 5.3.1 Lessee shall comply with applicable federal, state and local laws in the exercise and performance of its rights and obligations under this Agreement. Lessee shall comply with any City permit issued to Lessee in connection with the location of Lessee's Infrastructure within the public right-of-way. Lessee shall obtain, as required, any and all necessary approvals for the design, construction, installation, operation and testing of Lessee's Infrastructure to be located within the City;
- 5.3.2 Lessee shall not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electric and telephone wires, electroliers, cable television, and other telecommunications, utility, and municipal property without the express written approval of the owner or owners of the affected property or properties. Lessee shall not do or permit anything to be done by anyone under its direct control or doing work on its behalf, other than the City, its employees, subcontractors, and agents, within the public right-of-way or to permit anyone under its direct control or doing work on its behalf, other than the City, its employees, subcontractors, and agents, to do anything that which may in any way obstruct or interfere with the rights of

any person located within the public right-of-way, or injure them, or use or allow the public right-of-way to be used by under its direct control or doing work on its behalf for any improper or unlawful purpose. Notwithstanding the foregoing, this shall not be construed to prohibit Lessee from installing Infrastructure within the City or otherwise exercising its rights and carrying out its obligations under this Agreement, provided however that this sentence is not intended nor shall it be construed to increase Lessee's rights under this Agreement.

- 5.3.3 Lessee shall keep all parts of the Leased Infrastructure that belong to City free of any liens that may be created or which may attach as the result of the acts or omissions of Lessee, its employees, subcontractors or agents. If such lien is filed, Lessee shall indemnify and hold harmless City from any and all costs to remove such lien including but not limited to reasonable attorneys' fees through appeal;
- 5.3.4 Lessee shall be permitted to pledge this Agreement as an asset for purposes of obtaining financing; however, if any entity to whom this Agreement has been pledged actually perfects its interest therein, that entity must comply with the provisions of Article 17 "Assignment". Lessee may not, under any circumstances pledge the actual dark fiber or Leased Infrastructure as an asset to anyone for any purpose. The Leased Infrastructure is public property owned by the City and shall not be pledged to any party.
- 5.3.5 Lessee shall not do or permit anything to be done by anyone under its direct control or doing work on its behalf, other than the City, its employees, subcontractors, and agents, in, on or about the Leased Infrastructure or Lessee's Infrastructure located within the City, which is prohibited by, or will in any way conflict with, any laws now in force by the City or which may hereafter be enacted or promulgated by an entity other than the City. However, if any laws, rules, ordinances, resolutions, or other regulations which are enacted or promulgated by a governmental entity (other than the City) after the Effective Dated of this Agreement materially (a) change the economics of this Agreement, or (b) interfere with Lessee's rights provided hereunder, City shall provide Lessee sixty (60) days notice of the required change and if the Lessee does not agree to comply, Lessee shall have the right to terminate this Agreement without penalty.
- 5.3.6 Lessee shall not, in connection with this Agreement, commit, cause, maintain or permit nor suffer, or allow to be committed, caused, maintained or permitted by anyone under its direct control or doing work on its behalf, other than the City, its employees, subcontractors, and agents, any waste, abuse or destructive use within the public right-of-way, nor any public or private nuisance, nor any other act or thing which may

disturb the quiet enjoyment of any other person lawfully using the public right-of-way;

- 5.3.7 Lessee shall be solely and fully responsible for the reporting of all hazardous materials releases to the appropriate agencies, when such releases are caused by, or result from, Lessee's activities or by anyone under its direct control or doing work on its behalf other than the City, its employees, subcontractors, and agents. Lessee shall take all necessary precautions to prevent any hazardous materials used by Lessee or by anyone under its direct control or doing work on its behalf, from entering into any storm or sewage drain system or from being released within the public right-of-way.

#### 5.4 City Covenants.

- 5.4.1 City shall comply with applicable federal, state and local laws in the exercise and performance of its rights and obligations under this Agreement. City shall comply with any City permit issued in connection with the Fiber Optic Infrastructure within the public right-of-way. City shall obtain, as required, any and all necessary approvals for the design, construction, installation, operation and testing of City's Infrastructure to be located within the City;

- 5.4.2 City shall not do or permit anything to be done by anyone under its direct control or doing work on its behalf in, on or about the Leased Infrastructure or Lessee's Infrastructure located within the City, which is prohibited by or will in any way conflict with any laws now in force or which may hereafter be enacted or promulgated. However, if any laws, rules, ordinances, resolutions or other regulations which are enacted or promulgated by a governmental entity (other than the City) after the Effective Date of this Agreement materially (a) change the economics of this Agreement, or (b) interfere with Lessee's or Lessor's rights provided hereunder, City shall provide Lessee sixty (60) days notice of the required change and if the Lessee does not agree to comply, City shall have the right to terminate this Agreement without penalty.

- 5.5 **Cooperation.** Lessee shall use reasonable commercial efforts to cooperate with the City concerning construction, installation and testing activities involving other leases or licensees under separate agreements with the City, in each case at the City's sole cost and expense. City will provide Lessee with reasonable advance notice, in writing, of the necessity for any such cooperation. The City shall reimburse Lessee for any and all documented direct costs and expenses incurred as a direct consequence of the City requesting such cooperation; however, Lessee shall not charge the City for personnel time or overhead unless City explicitly requested that personnel time and that time exceeds 8 hours.

- 5.6 **No Access by Lessee.** Other than as authorized in this Agreement, Lessee is prohibited from accessing, directly or indirectly, the Fiber Optic Infrastructure, or any part thereof, the transmission pathway, or any part thereof, or any City electric or other utility facility on City's side of the Demarcation Points. Unauthorized access by Lessee to, or use of, the Fiber Optic Infrastructure, the transmission pathway, or any City electric or other utility facility shall constitute a material breach of this Agreement. City may terminate for cause this Agreement upon the delivery of written Notice of Termination to Lessee, effective thirty (30) calendar days after its receipt by Lessee.

## **ARTICLE 6. FIBER OPTIC INFRASTRUCTURE MONITORING, MAINTENANCE, REPAIRS AND ALTERATIONS.**

- 6.1 **General.** City shall maintain the Fiber Optic Infrastructure in good operating condition and in accordance with the specifications set forth on Exhibit 7, throughout the term of this Lease.
- 6.2 **Contact Persons or Representatives**
- 6.2.1 Lessee shall furnish to the City, and update as changes occur, the current name, title, telephone number, and personal communications device number (including facsimile transmission number, cellular telephone number, and paging device number) of a representative of Lessee who shall be kept informed of the City's maintenance schedules ("Lessee's Representative"). This information shall be provided on the Personnel Contact Form set forth as Exhibit 9 and provided to the City's Representative. If Lessee fails to keep the City informed of its current Representative, then the City shall not be held liable for any failure to meet any notification or response provisions, resulting directly therefrom.
- 6.2.2 City shall provide to Lessee's Representative a 24/7/365 telephone number Lessee may call to report any perceived damage to or failure, interruption or impairment of the Leased Infrastructure ("City's Representative"). This information shall be provided on the Personnel Contact Form set forth as Exhibit 9 and provided to the Lessee's Representative.
- 6.3 **Routine Monitoring.**
- 6.3.1 The City shall monitor at least one fiber in the Fiber Optic Infrastructure for cable continuity on a 24-hour day, seven days per week, basis. The City shall not monitor the Leased Fibers.
- 6.3.2 The City, at its sole cost and expense, shall undertake timely maintenance and repairs to cure deficiencies in the Fiber Optic Infrastructure. Lessee is responsible for all maintenance and repairs on Lessee's side of the



Demarcation Points. Where routine monitoring reveals a potential maintenance issue, each Party shall, with regard to their respective Infrastructure, take reasonable and timely steps to address the issue prior to it affecting the operation or functionality of their respective Infrastructures. With regard to emergency repairs, see section 6.5 below.

6.3.3 Lessee may conduct independent diagnostic testing, fault isolation, repair verification, and end-to-end network testing, as it deems appropriate, on Lessee's side of the Demarcation Points. Lessee may notify the City's Representative in writing if it is determined as a result of its independent testing and surveillance programs, review of City-provided reports, or otherwise, that any part of the Leased Infrastructure does not conform to the performance standards set forth in Exhibit 7. The Parties shall confer to expedite trouble resolution and resolve possible differences in interpretation of trouble reports.

6.4 **Routine Operations.** City, at its sole cost and expense, shall schedule and perform Fiber Optic Infrastructure alterations, and routine operations, maintenance and repairs. City shall identify the time, location, and nature of each alteration or maintenance and repair job potentially affecting the Leased Infrastructure and/or Lessee's Infrastructure, and notify Lessee's Representative, via E-mail or facsimile transmission, at the earliest possible time but not less than 96 hours prior to the scheduled time.

## 6.5 **Emergency Repairs.**

6.5.1 **Scope of Work.** City shall provide all equipment, manpower, supervision, certified fiber optic splicers, consumable materials, equipment, tools, construction equipment and machinery, utilities, transportation, any and all applicable taxes, and other facilities and work as necessary for the proper execution and completion of temporary and permanent emergency restoration for operation of the fiber optic communications network, as outlined in the following sections, to the satisfaction of Lessee for the Work performed under this Agreement.

6.5.1.1 The Work consists of City providing emergency maintenance response and restoration services, including appropriate supervision, technical expertise, labor, equipment, and materials to assess and restore functionality to City's fiber optic network and facilities whenever necessary. Emergency maintenance provided in this section does not apply to fiber optic facilities not owned by the City, but owned and operated by the Lessee or third parties.

6.5.1.2 Execution of the Work shall include, at a minimum, the ability to respond as required herein upon report of damage to City's Fiber Optic facilities and to perform:

- 6.5.1.2.1 Underground and aerial defect discovery work to ascertain the extent of damage to fiber optic cables and/or facilities.
- 6.5.1.2.2 Underground Trenching and placement/repair of conduit and infrastructure City's Standards. *NOTE: The City construction standards and specifications may be obtained from the City Engineering Department at [Engineering@ci.santa-clara.ca.us](mailto:Engineering@ci.santa-clara.ca.us).*
- 6.5.1.2.3 Placement of underground fiber optic cable and facilities in conduit system.
- 6.5.1.2.4 Setting poles and/or repair of aerial facilities for fiber optic cable.
- 6.5.1.2.5 Placement of aerial fiber optic cable poles in compliance with California Public Utilities Commission General Order No. 95.
- 6.5.1.2.6 Splicing, termination and testing of fiber optic cable to City's Fiber Optics Standards.
- 6.5.2 **City's Serviceability Requirements.** City's fiber optic network shall be the only system eligible for service under this Agreement.
- 6.5.3 **City's Service Requirements.** City agrees to provide, and Lessee agrees to accept service according to the following standards:
  - 6.5.3.1 **Emergency Service Definition:** An emergency is defined as an abrupt failure of fiber optic cable functionality. City will provide emergency restoration services to splice or bridge around the fiber failure. This service will be provided for all fiber optic cable up to and including patch panel terminations.
  - 6.5.3.2 **Point of Contact:** City will provide a designated point of contact available by direct telephone service to initiate restoration service and from that point on will provide a designated point of contact by direct telephone service at the restoration site until all temporary or permanent restoration is complete. Lessee will provide an authorized Representative as a designated point of contact to the City to exchange required communications regarding restoration during the Emergency Service.
  - 6.5.3.3 **Coverage Area and Time:** City shall provide Emergency Restoration Services for its Santa Clara network. City Emergency Restoration Services will be available 7 days/week, 52 weeks/year, 24 hours/day, including City's observed holidays.

**6.5.3.4 Response Time:** Upon receipt of notification from Lessee's authorized representative to City indicating the existence of a potential problem, City's restoration supervisor shall be at the City Fiber Optic Central Office or other agreed upon location in Santa Clara within two (2) hours. City shall have appropriate restoration/repair personnel and equipment on site to begin restoration of fiber optic network functionality within four (4) hours of such notification.

**6.5.3.5 Status Reports:** City will initiate no less than hourly and on demand status reports to the designated Lessee's Representative during emergency temporary restoration. City will communicate all information regarding the condition and restoration through the City's Representative.

**6.5.4 Network Demarcation.** Emergency restoration services are in support of City's backbone single mode fiber cable, service lateral cables, and intra-building distribution cables. This agreement does not provide support for Lessee's equipment and/or network.

**6.5.5 Permanent Restoration.** After temporary restoration is complete, a permanent repair and site restoration plan will be proposed by City within 2 days. Upon City's approval this work will be scheduled and initiated.

**6.5.6 Additional Information.** Identification of communication system, contact and method to be used during Temporary Emergency Restoration activities (e.g., two-way radios and/or mobile phones).

**6.5.7 Route Modifications.** The City, at its sole cost and expense, may upon reasonable notice, modify the Fiber Optic Infrastructure as conditions and circumstances may warrant. These modifications may cause portions of the Fiber Optic Infrastructure to be relocated, permanently or temporarily, to one or more alternate locations within the public right-of-way, public utility easements, and licensed service properties.

**6.5.8** Relocation of Leased Infrastructure shall not affect the price Lessee pays for use of that Infrastructure.

**6.5.9** The City shall use its commercially reasonable efforts to ensure such action shall not directly or substantially interfere with the performance or operations of Lessee's Leased Infrastructure and/or Lessee's Infrastructure. Lessee shall cooperate with the City to effect any such modifications, in each case at the City's sole cost and expense.

## **ARTICLE 7. ACCESS TO LESSEE'S INFRASTRUCTURE**

- 7.1 **Grant of Access.** From time to time access to Lessee's Infrastructure located within the City may facilitate scheduled and non-scheduled maintenance and repair work associated with the Leased Infrastructure and related Fiber Optic Infrastructure. Lessee will cooperate with the City, its officers, employees, agents, representatives and contractors to allow ingress and egress for repairs to Leased Infrastructure and the Fiber Optic Infrastructure, at City's sole cost and expense. Notwithstanding the foregoing, the City shall have no right to alter, maintain or repair Lessee's Infrastructure. In no event shall the City, its officers, employees, agents, representatives, contractors, or subcontractors have access to Lessee's Infrastructure unless a representative of Lessee is present.
- 7.2 **Written Notice.** So long as an emergency situation does not exist, the City shall provide a written request at least forty-eight (48) hours notice in advance of any required ingress to Lessee's Infrastructure located within the City. If an emergency situation exists, the City shall provide a verbal request to the person identified pursuant to paragraph 6.2.1.

## **ARTICLE 8. JOINT MARKETING**

The City will cooperate with Lessee in joint marketing efforts to the extent that this does not conflict with the City's interests or those of other network service providers who otherwise may lease capacity from the City.

## **ARTICLE 9. UTILITIES AND OTHER SERVICES**

Other than the services described herein, no other utility or other service is provided by the City to Lessee pursuant to this Agreement. Other such services, if provided, are either governed by the City's Rules and Regulations or by separate agreement between the Parties.

## **ARTICLE 10. ADEQUATE ASSURANCE**

Within seven (7) business days of the Effective Date or within seven days of the date on which this Agreement is presented to the City Council, whichever is later, Lessee shall furnish to City, and maintain throughout the remainder of the Term of this Agreement, Adequate Assurance in the form of a cash deposit equal to the one (1) year's Lease Payment, securing the faithful performance by Lessee of its obligations under this Agreement. One year from the Effective Date of this Agreement provided that Lessee has not been in material breach of this Agreement, the City shall return one half of said cash deposit and continue to hold one half cash deposit through the remainder of the lease. If Lessee has been in material breach of this Agreement during the one year the cash deposit is held, the City is entitled to hold the cash deposit through the end of lease term. If City has drawn against the cash deposit as set forth in Article 11, Lessee is required to replenish the cash deposit, provided, however, that Lessee will not be required to replenish any cash deposit or provide any Adequate Assurance in excess of the value

of the remaining Lease Payments up to the expiration of the then-current Term. Failure to replenish the cash deposit on demand by the City as set forth in this Article 10 is a material breach of this Agreement.

## **ARTICLE 11. DEFAULT AND REMEDIES FOR DEFAULT**

**11.1 Default – Failure to Make Lease Payment.** Failure to make any Lease Payment shall be a material breach of the Agreement, subject to the following provisions.

- a. If Lessee fails to make any Lease Payment within ten (10) business days following the Due Date, City may issue a Notice of Default to Lessee.
- b. If Lessee fails to make any Lease Payment within ten (10) business days following the issuance by the City of Notice of Default, City may elect to (1) terminate this Lease, (2) continue attempts to collect the Lease Payment; (3) disconnect leased fiber, and/or (4) draw the amount of the Lease Payment from the Adequate Assurance.
- c. If the City elects to disconnect leased fiber, prior to any reconnection Lessee must cure default, refund any amounts deducted from Adequate Assurance, and pre-pay any re-connection or splicing costs in order to continue lease agreement and use of leased fiber.

**11.2 Default - Other Grounds.** This Agreement may be terminated by either Party ("Non-Defaulting Party") upon the commission of a material breach of this Agreement by the other Party ("Defaulting Party"). "Material breach" includes, but is not limited to, the following:

- a. Failure to perform any obligation requiring the payment of money under the provisions of this Agreement, other than failure to make a Lease Payment;
- b. Assignment or transfer of Defaulting Party's interest in this Agreement, whether voluntary or involuntary;
- c. Assignment of assets for the benefit of creditors;
- d. Abandonment of Lessee's Infrastructure in the public right-of-way or a failure to notify the City of such abandonment;
- e. Filing of a petition to have a Party to this Agreement adjudicated a bankrupt, or a petition for a reorganization or arrangement under any Law relating to bankruptcy or insolvency,
- f. A third party obtains a court order in a court of competent jurisdiction prohibiting the Defaulting Party from performing under this Agreement; or,
- g. In the event of any material representation, warranty, or statement made by a Party or Agreement that shall prove to have been incorrect in any material respect when made which adversely affects the rights of others.

**11.3 Notice in Event of Default.** In the event of a material breach of this Agreement, the Non-Defaulting Party shall give a Notice of Default to the Defaulting Party.

The Defaulting Party shall have ten (10) calendar days from receipt of the Notice of Default to cure the material breach.

- 11.4 Right to Cure.** When a cure of a material breach reasonably requires more than ten (10) calendar days, the Defaulting Party shall commence to cure within ten (10) calendar days of receipt of the Notice of Default, and shall thereafter diligently and continuously prosecute such cure to completion. Unless excused by the Non-Defaulting Party in writing, no cure shall take more than thirty (30) days to complete.
- 11.5 Cumulative Rights and Remedies.** The rights and remedies provided by law and under this Agreement are cumulative and either Party may seek the specific performance of the terms of this Agreement, unless this Agreement provides otherwise.

## **ARTICLE 12. TERMINATION**

This Agreement may be terminated upon the occurrence of any of the following events:

- a. Upon occurrence of a material breach as set forth in Article 11 above;
- b. Lessee terminates this Agreement for convenience, pursuant to Article 13, for all or a portion of the Leased Infrastructure. In the event such termination pursuant to Article 13 is a partial termination, Lessee shall continue to make quarterly Lease Payments with respect to any Leased Infrastructure that have not been the subject of the termination. However, Lessee does not have the right to terminate this Agreement for convenience as to any stranded fiber, which fiber is stranded due to the manner in which Lessee chose to route or splice the Leased Fiber;
- c. City fails to deliver the Leased Infrastructure (excluding any new extensions of new construction to accommodate the unique requirements of Lessee) on or before the date mutually agreed upon by the Parties and set forth in Exhibit 4 or Exhibit 10 unless such failure is due to reasons beyond the control of City or Force Majeure. Such termination shall be without liability to either City or Lessee unless, and to the extent that, the failure to meet the deadline is caused by Lessee;
- d. An event of Force Majeure that destroys Lessee's Infrastructure located within the City such that such Infrastructure cannot be repaired, restored or replaced at a reasonable cost within sixty (60) calendar days after an event of destruction. Lessee shall be excused from its obligations to make lease payments during the pendency of a Force Majeure, not to exceed six (6) months from the date of the destruction. Either Party may elect to terminate this Agreement if Lessee does not commence Lease Payments within six (6) months of the date of destruction, in which case no Termination Payment shall be owed by either Party;
- e. The City may elect to terminate this Agreement if the Fiber Optic Infrastructure is substantially destroyed by Force Majeure such that it

cannot be repaired at a reasonable cost and within six (6) months from the date of destruction, and Lessee shall not owe the City any Lease Payment or shall be entitled to an appropriate credit if prepayments are involved. If the City elects to terminate this Agreement as set forth above, Lessee shall not owe the City any Lease Payment or shall be entitled to an appropriate credit if prepayments are involved, for the period from the date of destruction until the Agreement either is terminated or the Fiber Optic Infrastructure is repaired by the City. Lessee may elect to terminate this Agreement if the Fiber Optic Infrastructure is substantially destroyed such that the City cannot repair the Fiber Optic Infrastructure within sixty (60) calendar days of the date of destruction, in which case no Termination Payment shall be owed by either Party.

#### **ARTICLE 13. TERMINATION PAYMENT**

- 13.1 Lessee may terminate the lease of fiber of any Service Drop, Building Entrance, Lateral Extension, or a Private Property Access to a Building Entrance without penalty and without paying the Termination Payment for that fiber so long as Lessee has fully paid all engineering and construction costs, or accrued third party charges for entrance fees (provided lessee was obligated to pay City for any such engineering and construction costs or accrued third party charges for entrance fees), due to City for that item. Lessee's Lease Payment shall be reduced by the amount of fiber that it no longer leases in that Service Drop, Building Entrance, or Private Property Access to the Building Entrance.
- 13.2 For termination of this Agreement with regard to any portion of the Leased Infrastructure other than a Service Drop, Private Property Access or a Building Entrance as set forth in paragraph 13.1 above, Lessee may elect to terminate this Agreement for convenience, for all (or a portion of) Leased Fibers. At the time of Termination, Lessee would pay a Termination Fee equal to three times the (apportioned) annual payment due within the subsequent four quarters, or 40 percent of remaining (apportioned) lease payments due under terms of the Agreement, whichever is less. Termination Fees are to be based on current year prices (at the time of Termination) without inclusion of going forward CPI adjustments. Note: Stranded fiber may not be terminated for convenience without Lessee paying a termination fee with respect to such stranded fiber.

#### **ARTICLE 14. LIMITATION OF LIABILITY**

- 14.1 EXCEPT FOR THIRD PARTY CLAIMS WHICH ARE SUBJECT TO ARTICLE 15 AND AS PROVIDED FOR IN THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL, INDIRECT, LIQUIDATED, OR SPECIAL DAMAGES OR LOST REVENUE OR LOST PROFITS ARISING OUT OF THE PERFORMANCE OR NON-PERFORMANCE OF ANY PROVISION OF THIS AGREEMENT, EVEN IF

SUCH PARTY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES.

- 14.2 City shall not be liable to Lessee in any manner for any delays and/or lack of completion of construction for reasons constituting a Force Majeure.
- 14.3 City is not liable to Lessee for damage caused to the Fiber Optic Infrastructure by independent third parties not under contract with the City that are engaged in construction or other business operations which damage the Fiber Optic Infrastructure. City will respond and repair any damage to the Fiber Optic Infrastructure caused by such a third party as if it were an Emergency Repair under Article 6.
- 14.4 Inability to use the Leased Fiber due to an electrical power outage is not covered by this Agreement. This Agreement is a lease of dark fiber. Any issues arising out of the inability of Lessee to obtain electricity shall be handled under the applicable City of Santa Clara Rules and Regulations if Lessee is also an electric customer of City.
- 14.5 Neither Party shall be in default in the performance of any obligation under this Agreement when a failure to perform its obligations under this Agreement shall be due to Force Majeure (as defined in Exhibit 1). For the duration of the Force Majeure, but for no longer period, the obligations of the Party claiming the event (other than the obligations to make payments then due or becoming due with respect to performance prior to the event) shall be suspended to the extent required.
- 14.6 Either Party rendered unable to fulfill any of its obligations by reason of Force Majeure shall give prompt written notice and full details of the event to be confirmed in writing to the other Party, as soon as possible, but in no event later than five (5) days after the occurrence (unless additional time is required by virtue of Force Majeure). The Party claiming Force Majeure shall exercise due diligence to remove such inability within a reasonable time period.

#### **ARTICLE 15. HOLD HARMLESS/INDEMNIFICATION.**

- 15.1 **By Lessee.** Subject to the terms of Section 14, Lessee shall indemnify, defend and hold harmless City, its City Council, commissioners, employees, officers, directors, subcontractors, consultants and agents from and against any and all claims, demands, causes of action, losses, damages, costs and expenses of every kind and character (but excluding any claim of lost profits) arising on account of all personal injury or death or damage to City property caused by or resulting from the acts or omissions of Lessee, its employees, subcontractors or agents.
- 15.2 **By City.** Subject to the terms of Section 14, City shall indemnify, defend and hold harmless Lessee its employees, officers, directors, subcontractors,



consultants and agents from and against any and all claims, demands, causes of action, losses, damages, costs and expenses of every kind and character (but excluding any claim of lost profits) arising on account of all personal injury or death or damage to Lessee's property caused by or resulting from the acts or omissions of the City, its employees, subcontractors or agents.

## **ARTICLE 16. REPRESENTATIONS AND WARRANTIES**

### **16.1 By City: The City represents and warrants:**

- 16.1.1 It is a municipal corporation duly organized and validly existing and in good standing under the Laws of the State of California. It has all requisite corporate power and authority to own its property, real and personal (including but not limited to the Fiber Optic Infrastructure), and operate its business as and where it is now being conducted.
- 16.1.2 It has the power and authority to enter into this Agreement and perform its obligations hereunder. The execution, delivery and performance of this Agreement have been duly authorized by all necessary actions and proceedings. This Agreement and any other instruments, documents or writings to be executed and delivered by the City pursuant to this Agreement, will not conflict with or violate any provision of the Charter of the City of Santa Clara or the Santa Clara Municipal Code and will be legal, valid and binding obligations of the City, and enforceable against the City in accordance with the provisions hereof except as may be limited by applicable laws.
- 16.1.3 The execution and delivery by the City of this Agreement and of any other instrument, document or writing contemplated by this Agreement will not conflict with or violate or constitute a breach or default under the charter or bylaws of the City, or the provision of any mortgage, trust, indenture, bond, lien, pledge, release, agreement, guaranty, or instrument to which the City is subject.
- 16.1.4 There are no known unresolved claims or disputes between Lessee and the City. There are no known actions, suits, or proceedings pending or, to the knowledge of the City, threatened against the City that, if adversely determined to the City, would materially and adversely affect the ability of the City to perform its obligations under this Agreement.
- 16.1.5 The City agrees to obtain and maintain any certificates, licenses, or approvals required by law that relate to its obligations under this Agreement.
- 16.1.6 City shall maintain the Fiber Optic Infrastructure in good operating condition for normal use as contemplated by the manufacturers and in

accordance with the specifications set forth in Exhibit 7. THE CITY OTHERWISE EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY BEYOND THE MANUFACTURER'S WARRANTY AS TO THE FITNESS OF ANY MATERIALS, EQUIPMENT OR ANY OTHER PART OR ALL OF THE FIBER OPTIC INFRASTRUCTURE OR THE LEASED INFRASTRUCTURE, CONSTRUCTED OR TO BE CONSTRUCTED. The warranties and remedies set forth above constitute the only warranties and remedies with respect to this Agreement and are in lieu of all other warranties, written or oral, statutory, express or implied, including, without limitation, the warranty of merchantability or fitness for a particular purpose or use.

**16.2 By Lessee:** Lessee represents and warrants:

- 16.2.1 It is a duly organized and validly existing corporation in good standing under the Laws of the State of Delaware and authorized to do business in the State of California. It has all requisite corporate power and authority to own its property, real and personal, and operate its business as and where it is now being conducted.
- 16.2.2 It has the power and authority to enter into this Agreement and perform its obligations hereunder. The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate actions and proceedings. This Agreement is, and any other instruments, documents or writings to be executed and delivered by Lessee pursuant to this Agreement will be, legal, valid and binding obligations of Lessee, and enforceable against Lessee in accordance with the provisions hereof except as may be limited by applicable laws.
- 16.2.3 The execution and delivery by Lessee of this Agreement and of any other instruments, documents or writings contemplated by this Agreement will not conflict with or violate or constitute a breach or default under the Certificate of Incorporation or bylaws of Lessee or the provision of any mortgage, trust, indenture, bond, lien, pledge, release, agreement, guaranty or instrument to which Lessee is subject.
- 16.2.4 There are no known unresolved claims or disputes between Lessee and the City. There are no known actions, suits or proceedings pending or, to the knowledge of Lessee, threatened against Lessee that, if adversely determined to Lessee, would materially and adversely affect the ability of Lessee to perform its obligations under this Agreement.
- 16.2.5 Lessee agrees to obtain and maintain any certificates, licenses or approvals required by law that relate to its obligations under this Agreement.

## ARTICLE 17. ASSIGNMENT

- 17.1 Except as otherwise permitted by this Article, Lessee shall not assign, sublease or otherwise transfer in whole or in part (whether voluntarily or by action of law), directly, indirectly, or contingently this Lease or any interest herein to any third party, without the prior written consent of City, which consent shall not be unreasonably withheld.
- 17.2 Without City's prior consent, Lessee may assign, sublease or otherwise transfer in whole or in part (whether voluntarily or by action of law), directly, indirectly, or contingently this Lease or any interest herein to an Affiliate, so long as that Affiliate provides information to the City within thirty (30) days of the assignment, establishing that it either (i) has the ability to meet the financial obligations under this Lease or (ii) concurrently with the assignment, Lessee assigned to Affiliate the right to the Adequate Assurance provided by Lessee to City pursuant to paragraph 10 herein or (iii) Affiliate has otherwise provided City with substitute Adequate Assurance. If Affiliate fails to meet one of the three criteria set forth above, the Assignment shall be null and void.
- 17.3 Lessee may assign, sublease or transfer, pursuant to a merger, sale or transfer of all or substantially all of the assets or stock of Lessee, all of its rights and obligations under this Agreement to any party which provides similar services as Lessee, so long as the surviving or purchasing entity assumes, in writing, all of the obligations of Lessee under this Agreement and provides information acceptable to the City within thirty (30) days after the assignment, sublease, transfer, merger or sale, sufficient to satisfy the City that the proposed Assignee can meet those obligations. If the proposed Assignee cannot meet those financial obligations, then Adequate Assurance acceptable to the City will be provided within sixty (60) days of the date of the transfer, merger or sale. If Assignee fails to provide Adequate Assurance, the Assignment shall be null and void.
- 17.4 Any assignment, transfer, sublease, conveyance, sale, hypothecation or encumbrance hereof by Lessee not authorized by this Article shall be null and void, and, at the option of the City, acting by and through the City Manager with the approval of the City Attorney, shall constitute a material breach of this Agreement by Lessee hereunder;
- 17.5 Lessee, as assignor, and any person, including an Affiliate, as assignee, to whom the rights and obligations of Lessee under this Agreement are assigned shall be and remain jointly and severally liable for the performance of all obligations of Lessee under this Agreement.

## ARTICLE 18. WAIVER

The consent by a Party to any act by the other Party shall not be deemed to imply consent to, or to constitute the waiver of, a breach of any provision of this Agreement nor shall any custom or practice which may arise between the Parties in the administration of any part of the provisions of this Agreement be construed to waive or lessen the right of a Party to insist upon the performance by the other Party in strict accordance with the provisions of this Agreement.

## ARTICLE 19. INSURANCE REQUIREMENTS.

19.1 Insurance requirements are not applicable to this agreement.

## ARTICLE 20. DISPUTE RESOLUTION.

Any documented dispute between the Parties which arises during the performance of this Agreement and which the Parties cannot then resolve, shall be subject to the following administrative remedy prior to any litigation occurring between the Parties:

- 20.1 **Internal Resolution.** Both Parties shall attempt to resolve any controversy claim, problem or dispute arising out of, or related to, this Agreement through good faith consultation in the ordinary course of business. In the event that any problem or dispute is not resolved by the project managers of each party, either party may upon written notice to the other request that the matter be referred to senior management officials within each respective organization with express authority to resolve the problem or issue ("Request for Internal Resolution"). A written Request for Internal Resolution shall be given by either Party within thirty (30) calendar days of the Parties' knowledge of the claim. Senior management officials shall meet or confer at least once in good faith, to negotiate a mutually acceptable resolution within ten (10) business days of the Request for Internal Resolution.
- 20.2 **Notice.** Senior management officials are required to only meet once, but may mutually agree to meet more than once if it appears that further meetings may successfully resolve the issue. If the Parties do not successfully resolve the dispute by Internal Resolution, then the Party finding the Internal Resolution unsatisfactory shall provide written notice to the other Party, demanding mediation ("Request for Mediation"). The Request for Mediation may not be given prior to the first meeting for Internal Resolution, and shall not be given any later than ninety (90) calendar days following the completion of the first Internal Resolution meeting. The Request for Mediation shall be sent certified mail-return receipt requested to the other Party, and shall set forth all of the issues that Party deems outstanding that must be submitted to mediation. The Party in receipt of the Request for Mediation shall respond within twenty (20) business days listing any issues it deems appropriate for submission to the Mediator.

- 20.3 **Mediation.** Any controversies between City and Lessee regarding the construction or application of this Agreement, and claims arising out of this Agreement or its breach (except those for which the appropriate remedy should be injunctive relief) shall be mediated within sixty (60) calendar days of the date on the written Request for Mediation, or the soonest date thereafter that the mediator is available.
- 20.4 **Mediator.** Within twenty (20) calendar days or less of the written Request for Mediation, the Parties shall agree on one mediator. If they cannot agree on one mediator within such twenty-day period each Party shall list the names of three (3) potential mediators and shall supply them to the Party demanding the mediation. The Party demanding the mediation shall merge the names of all the potential mediators into a single list, not indicating which Party submitted the name. On that same date as all names are received by the demanding Party, the Parties shall jointly sign a letter directed to the Presiding Judge of the Superior Court of Santa Clara County, requesting that the Judge appoint a mediator from the enclosed list. If the Superior Court refuses to appoint a mediator within ten (10) business days, the Parties shall make the same request of the nearest Judicial Arbitration and Mediation Service, paying whatever fee is required for making the appointment. If a Party refuses or fails to submit three (3) names within the three day period to the Party preparing the letter, then the letter shall be sent on the fifth day without input from the Party failing to submit names. The mediation meeting shall not exceed one day (eight (8) hours). The Parties may agree to extend the time allowed for mediation under this Agreement.
- 20.5 **Costs.** The costs of mediation shall be borne by the Parties equally.
- 20.6 **Discovery.** If, during any dispute between the Parties, Lessee makes a demand for documents under the Public Records Act, the City shall have reciprocal rights to demand documents from Lessee.
- 20.7 **Condition Precedent to Filing Suit.** Except as provided in Article 20.3 (injunctive relief), mediation under this section is a condition precedent to a Party filing an action in any court, unless that Party has made demand for mediation and the other Party has failed or refused to engage in mediation. In the event of litigation arising out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees; expert witness costs and cost of suit, regardless of the outcome of the litigation.

## ARTICLE 21. NOTICE

- 21.1 Unless otherwise stated herein, all notices which shall or may be given pursuant to this Agreement shall be in writing and delivered by means of certified United States Postal Service mail, return receipt requested, or private overnight delivery systems, or by facsimile transmission, provided a copy of

the facsimile is also sent on that same date by United States Postal Service mail or by private express delivery systems, addressed as follows:

To City:

City of Santa Clara  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Attn.: Director of Electric Utility  
Telephone No.: (408) 261-5292  
Facsimile No.: (408) 249-0217

To Lessee:

NVIDIA Corporation  
Address: 2701 San Tomas Expressway  
Santa Clara, CA 95050  
Attn.: General Counsel  
Telephone No: (408) 486-8116  
Facsimile No: (408) 486-8616

- 21.2 Notices shall be deemed received on the same day as a facsimile is sent, the day following the date on which the Notice was sent via an overnight mail service, and five (5) calendar days from the date postmarked by the United States Postal Service. If Notice is given pursuant to two different methods receipt shall be deemed to occur on the earliest date.

## ARTICLE 22. CONFIDENTIALITY

- 22.1 **General.** Lessee acknowledges that City is a public agency subject to the requirements of the California Public Records Act Cal. Gov. Code section 6250 et seq. City acknowledges that Lessee may submit information to the City that Lessee considers confidential, proprietary, or trade secret information pursuant the Uniform Trade Secrets Act (Cal. Civil Code section 3426 et seq.), or otherwise not subject to disclosure pursuant to an exemption to the California Public Records Act (Government Code section 6254 et seq.). Lessee acknowledges that the City may submit to Lessee information that the City considers confidential or proprietary or not subject to disclosure pursuant to an exemption to the California Public Records Act (Government Code section 6254 et seq.). Any Party desiring to claim that information shared with the other Party is "Confidential Information", shall clearly label written information "Confidential" before releasing it to the other Party, and in the case of oral information, shall state that such information is confidential when given and shall confirm in writing the confidentiality of such information promptly thereafter.
- 22.2 **Requests Made Under the Public Records Act.** Upon request or demand of any third person or entity not a party to this Agreement ("Requestor") for production, inspection and/or copying of information designated by a the party disclosing the

Confidential Information ("Disclosing Party") as "Confidential Information" (i) that is made under the Public Records Act, and (ii) is not exempt from disclosure under the Public Records Act, the party that is the recipient of the Confidential Information ("Receiving Party"), as soon as is practical but in any event within three (3) business days of receipt of the request, shall notify the Disclosing Party by telephone call, letter sent via facsimile and/or by US Mail to the address and facsimile number listed at the end of the Agreement that such request has been made. The Disclosing Party shall be responsible for taking whatever legal steps are necessary to protect information deemed by it to be "Confidential Information" and to prevent release of information to the Requestor by the Receiving Party, including prosecuting any defense that the information demanded is exempt from disclosure under the Public Records Act. The Receiving Party will provide reasonable cooperation and assistance to the Disclosing Party in preventing the release of the Confidential Information without compensation; however, if Disclosing Party requires significant dedication of Receiving Party's time, the Parties shall agree on a fair compensation or limit the hours Receiving Party is taken from duties at its employer. If the Disclosing Party takes no such action within seven (7) days after receiving the foregoing notice from the Receiving Party, the Receiving Party notify Requestor that it requires the allowed ten (10) day extension under the Public Records Act. If Disclosing Party fails to take any action within twenty (20) days of the date on the original Public Records Act demand, then Receiving Party is required by law to comply with the demand and is not required to defend against it.

- 22.3 **All Other Requests.** Except for disclosures expressly required under the Public Records Act, the Parties acknowledge and agree that any information properly labeled in accordance with paragraph 22.1 and provided now or in connection with this Agreement, [including without limitation, the terms and conditions of this Agreement set forth in Exhibits 3, 4, and 5], shall be considered Confidential Information of the Disclosing Party. [It is acknowledged by the Parties that this Lease Agreement and Exhibits 1, 2, 6, 7, 8, 9, and 10, are public record.] The Receiving Party shall afford such Confidential Information the same care and protection it generally affords its own confidential and proprietary information (which shall not be less than reasonable care, in any case), and further agrees not to use or disclose to any third party the Confidential Information of the Disclosing Party, except as required for performance of its obligations under this Agreement.

- 22.3.1 Each Party shall restrict dissemination of Confidential Information to only those persons in its respective organizations, or to its agents, funding partners, fiber optic consultants, legal and financial advisors and lenders who must have access to such Confidential Information in order to perform the obligations required by the Parties under this Agreement or obtain financing; provided, however, that such person or entities shall be made aware of the confidentiality of such information and are subject to or agree to be bound by substantially similar restrictions on its use and disclosure.

22.3.2 Neither Party shall be required to hold confidential any information which (i) is or becomes publicly available other than through the Receiving Party; (ii) is independently developed by the Receiving Party; (iii) becomes available to the Receiving Party without restriction from a third party that has no duty of confidentiality with respect to such information; or (iv) is legally required to be disclosed (including securities and regulatory filings and statements), provided that in such circumstances the Receiving Party first provides the Disclosing Party with notice of such required disclosure and takes reasonable steps to allow the Disclosing Party to seek a protective order with respect to the Confidential Information. The Receiving Party will cooperate and assist the Disclosing Party in connection with such protective order at the Disclosing Party's request as detailed in paragraph 22.2 above.

22.4 **Permitted Disclosures:** Notwithstanding the other provisions of this Article and without waiver of any obligations hereunder, the City may disclose the identity of Lessee as a customer of City, and Lessee may disclose the identity of City as a supplier of Lessee. The body of this Agreement shall be public record, but Exhibits 3, 4, and 5 shall be held as confidential. No other disclosures, including press releases or other public announcements about this Agreement may be disclosed, except with the prior written consent of the Parties hereto.

22.5 **General. Confidential information shall be deemed to be the property of the Disclosing Party.** All Confidential Information, unless otherwise specified in writing, shall be used by the Receiving Party only for the intended purpose, and such written Confidential Information, including all copies thereof, shall be returned to the Disclosing Party or destroyed upon the request of the Disclosing Party. If the Receiving Party loses or makes an unauthorized disclosure of Confidential Information it shall immediately notify the Disclosing party and use reasonable efforts to find, retrieve and/or stop the dissemination of such Confidential Information. The provisions of this Article shall survive expiration or earlier termination of this Agreement.

## **ARTICLE 23. ENTIRE AGREEMENT**

This Agreement, and its Exhibits contain the entire understanding between the Parties with respect to the subject matter herein. There are no representations, warranties, agreements or understandings (whether oral or written) between the Parties relating to the subject matter hereof which are not fully expressed herein.

## **ARTICLE 24. AMENDMENT**

This Agreement may not be amended except pursuant to a written instrument signed by each of the Parties.



## **ARTICLE 25. HEADINGS**

The Article headings hereof are inserted for convenience of reference only, are not a part hereof and shall have no effect on the construction or interpretation hereof. All Exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to in any duly executed amendment to this Agreement are incorporated by this reference into this Agreement and shall be deemed a part hereof.

## **ARTICLE 26. GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the Laws of the State of California without regard to its conflict of laws, rules or principles. In the event that suit is brought by a Party, the Parties agree that trial of such action shall be vested exclusively in the state courts of California or in the United States District Court, Northern District of California. This Agreement is entered into in the City of Santa Clara, and shall be performed in the City of Santa Clara, County of Santa Clara, State of California.

## **ARTICLE 27. SEVERABILITY**

If any provision of this Agreement is held by court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision shall be deemed severable from the remaining provisions and shall in no way affect the validity of the remaining portions hereof. To the extent the provisions of this Agreement and any other agreement required to be obtained by Lessee from the City are in conflict, the provisions of the agreement which impose the higher or greater legal duty or obligation shall take precedence.

## **ARTICLE 28. CONSTRUCTION OF AGREEMENT**

28.1 Each Party and its counsel have reviewed this Agreement. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the construction and interpretation of this Agreement.

(continued on page 41)

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28.2 For the purposes hereof, the time in which an act is to be performed shall be computed by excluding the first day and including the last. If the time in which an act is to be performed falls on a Saturday, Sunday, or any day observed as an official holiday by the City, the time for performance shall be extended to the following business day.

The Parties acknowledge and accept the terms and conditions stated herein as evidenced by the following signatures of their duly authorized representatives. It is the intent of the City and Lessee that this Agreement shall become operative on the Effective Date first set forth in the preamble, above.

**CITY OF SANTA CLARA**  
**a chartered California municipal corporation**

**Approved as to form:**

\_\_\_\_\_  
**HELENE L. LEICHTER**  
City Attorney

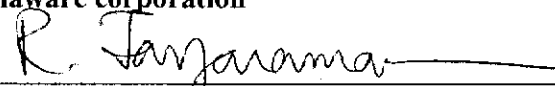
**Attest:**

\_\_\_\_\_  
**ROD DIRIDON, JR.**  
City Clerk

\_\_\_\_\_  
**JENNIFER SPARACINO**  
City Manager  
1500 Warburton Avenue  
Santa Clara, California 95050  
Telephone: (408) 615-2210  
Facsimile: (408) 241-6771

“City”

**NVIDIA CORPORATION**  
**a Delaware corporation**

By:   
Title: **RANGA JAYARAMAN**  
Chief Information Officer  
Address: 2701 San Tomas Expressway  
Santa Clara, CA 95050  
Telephone: (408) 486-2000  
Facsimile: (408) 486-2200

# **City of Santa Clara and NVIDIA Corporation**

## **Fiber Lease Agreement**

### **LIST OF EXHIBITS**

- Exhibit 1 Definitions
- Exhibit 2 Map (*confidential*)
- Exhibit 3 Fiber Miles (*confidential*)
- Exhibit 4 Attachment Points, Service Drops & Backbone Extensions (*confidential*)
- Exhibit 5 Lease Payment & Term (*confidential*)
- Exhibit 6 Notice of Completion and Notice of Acceptance/Rejection
- Exhibit 7 Fiber Specifications, Performance Standards and Acceptance Testing
- Exhibit 8 Engineering Information Form (*confidential*)
- Exhibit 9 Personnel Contact Form (*confidential*)
- Exhibit 10 Request Form

## **EXHIBIT 1 DEFINITIONS**

### **Acceptance**

Acceptance of the Fiber Infrastructure may be made by Lessee signing a Notice of Acceptance or Lessee's first use of the Fiber Infrastructure, for other than testing purposes.

### **Acceptance Testing**

The testing conducted on any Leased Fibers prior to acceptance by Lessee in order to verify that the Leased Fibers meet the performance specifications set forth in Exhibit 7.

### **Additional Attachment Points**

Attachment Points requested by Lessee, and agreed to by the City, by amendment to this Agreement after the Effective Date.

### **Additional Backbone Extension(s)**

Backbone Extensions requested by Lessee, and agreed to and built by the City, by amendment to this Agreement after the Effective Date.

### **Additional Leased Fiber(s)**

Leaseable Fibers leased to Lessee by amendment to this Agreement after the Effective Date.

### **Additional Leased Infrastructure**

The combination of any Leased Fibers, Attachment Points, Backbone Extensions, Service Drops, Private Property Access, Lateral Extensions or Building Entrances that are later added to this Agreement by the Parties executing one or more versions of Exhibit 10.

### **Additional Service Drop(s)**

Service Drops requested by Lessee, and agreed to and installed by the City, by amendment to this Agreement after the Effective Date.

### **Affiliate**

A company that has some form of ownership in common with Lessee, such as a parent company or subsidiary of Lessee or Lessee's parent company.

### **As-built Infrastructure**

The actual location of Lessee's Infrastructure and fiber routes following construction.

### **Attachment Point(s)**

Existing or new fiber optic pullboxes located on the Fiber Optic Infrastructure and delineated in Exhibit 4 where Lessee will be allowed to connect its facilities to the Leased Fibers. Attachment Points are owned by the City.

**Authorized Representative**

A person legally authorized by Lessee to bind Lessee to the terms of a contract.

**Backbone**

The physical location of the Fiber Optic Infrastructure.

**Backbone Extension**

A new addition to the Backbone that would benefit other potential lessees and that the City will own and construct. The City may lease Leaseable Fibers in any Backbone Extension to third parties other than this Lessee. In general, a Backbone Extension travels to a location that many other potential lessees also desire; it does not travel to a location that is solely used by this Lessee (See Service Drop).

**Building Entrance**

Attachment of Leasable or Leased Fiber to a meet-me box, panel inside a privately owned building or other privately owned Point of Presence, and allowed by an agreement or written contract between the City and the owner of that Point of Presence or building.

**Cable Service**

The offering of broadband television and/or streaming video segments of more than ten (10) minutes in duration to the general public or select public by use of a wire, cable, or fiber network

**City Fiber**

The fiber used by, or reserved, for use by the City for municipal communications purposes.

**Date of Delivery**

Upon receipt by the City of an executed Notice of Acceptance, the Leased Infrastructure that is the subject of the Notice of Acceptance shall be deemed to have been ready for immediate use and interconnection by Lessee to Lessee's Infrastructure as of the Date of Delivery. The earlier of the date on which Lessee signs the Notice of Acceptance in accordance with Section 4.5 or the date that Lessee begins to use the Leased Fiber for purposes other than testing shall be the "Date of Delivery" of the affected Leased Infrastructure.

**Days of Availability**

Number of days Leased Fiber is supplied to Lessee or is available for its use after Acceptance by Lessee.

**Demarcation Point(s)**

The specific points at which the Fiber Optic Infrastructure connects to Lessee Infrastructure and ownership changes.

**Due Date**

The date on which a Lease Payment or payment on any invoice is due to the City.

**Electric Department**

The electric utility of the City of Santa Clara, doing business as Silicon Valley Power.

**Engineering Information Form**

Form used by Lessee to inform the City of Lessee's Planned Infrastructure interconnected with the City's Fiber Optic Infrastructure pursuant to section 5.1

**Fiber Optic Infrastructure**

Fiber optic cable, splices, associated structures including conduits and boxes, and other facilities designed, constructed and installed by, or on behalf of, the City.

**Force Majeure**

Any cause beyond the control of the Party affected, and which by exercise of reasonable due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it has been unable to overcome or obtain or cause to be obtained a commercially reasonable substitute therefore. Force Majeure includes Acts of God, flood, drought, earthquake, storm, tornado, fire, explosion, lightening, epidemic, public emergency, war, riot, civil disobedience, labor strike, labor dispute, labor or materials shortage (however labor or materials shortage does not include the mere inability to obtain that labor or material at a particular price), sabotage, restraint by court order, restraint by public authority, or action or non-action by governmental authority or accident. No Party shall, however, be relieved of liability for failure of performance if such failure is due to causes arising out of its own negligence or due to the removal of remediable causes which it fails to take reasonable efforts to remove or remedy within a reasonable time, or due to mere fluctuations in market prices. Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it may be involved. Either Party rendered unable to fulfill any of its obligations under this Agreement by reason of Force Majeure shall give prompt written notice of such fact to the other Party and shall exercise due diligence to remove such inability with all reasonable dispatch.

**Initial Term**

The length of the Initial Term is set forth in Exhibit 5.

**Lateral Extensions and/or Private Property Access**

Extends from the public right-of-way onto private property and typically terminate at a meet-me box or other form of entrance into a private building.

**Leaseable Fiber(s)**

Any fiber (dark fiber) within the Fiber Optic Infrastructure, other than the City-Fiber (including but not limited to the General Government Network and Electric Department Network), available for leasing or licensing.

**Lease**

The right and privilege to use Leased Fibers, and any Additional Leased Fibers, during the Term hereof and in accordance with the provisions of this Agreement.

**Lease Payment**

The quarterly fee owed by Lessee for Leased Fibers as set forth in Exhibit 5 and otherwise established by this Agreement.

**Lessee's Infrastructure**

Any conduit, fiber, premises, buildings, boxes etc. belonging to Lessee

**Leased Fiber(s)**

The Leaseable Fibers leased to Lessee under this Agreement as depicted on Exhibit 3.

**Leased Infrastructure**

The combination of Leased Fibers, Attachment Points, Backbone Extensions, Service Drops, Lateral Extensions or Building Entrances which Lessee is entitled to use pursuant to this Agreement or pursuant to an executed Exhibit 10.

**Notice of Completion**

The notice sent by the City to Lessee upon completion of construction of any configuration of Leased Fibers, a copy of which is attached hereto as Exhibit 6.

**Notice of Acceptance/Rejection**

The form completed by Lessee notifying the City of those Leased Fibers that are in compliance with the Acceptance Testing and accepted and those that are not in compliance and not accepted, a copy of which form is attached hereto as Exhibit 6.

**Notice of Termination**

A written notice sent by either Party to the other terminating this Agreement.

**Performance Specifications**

Those specifications relating to the fiber that are set forth in Exhibit 7.

**Preliminary Engineering Services**

Providing distances from the City's Fiber Optic Backbone to locations desired by Counterparty, providing information on conduit sizing, location of Attachment Points, feasibility of Backbone Extensions or Service Drops, and an Engineer's estimate for the cost of splicing Counterparty's desired configuration as well as an Engineer's estimate for installing additional conduit, fiber, Attachment Points, Service Drops, Backbone Extensions, Laterals or Building Entrances. Preliminary Engineering Services does not include provisions of any drawings or specifications by SVP to Counterparty or estimates for Counterparty to obtain access to private property or entrance agreements with private building owners.

**Post-Construction Testing**

Testing conducted by the City immediately following construction of the subject item, (including but not limited to any Leased Fiber, Backbone Extension, Attachment Point or Service Drop) to ensure the performance of said portion meets the requirements set forth in Exhibit 7.

**Private Property Access and/or Lateral Extensions.**

Extends from the public right-of-way onto private property and typically terminate at a meet-me box or other form of entrance into a private building.

**Qualified Party**

An entity that it is now, or shall be prior to operating any Telecommunications, duly authorized, licensed or otherwise qualified to operate Telecommunications as required by applicable state or federal laws.

**Redundant Paths**

The two or more Leased Infrastructure routes connecting portions of Lessee's Infrastructure that provide iterating, spare, or repetitious pathways within that Infrastructure.

**Reimbursable Amount**

To calculate the Reimbursable Amount, the total cost of engineering services and cost of construction (including the City's ten percent fee) shall be divided by the number of fibers running to or through the item constructed in order to obtain a cost per fiber. Each time a new lessee requests fiber in a location that was built by the City but paid for by Lessee, that new lessee shall be charged the Reimbursable Amount for each fiber that new lessee desires in that location. The Reimbursable Amount will be collected by the City on the new lessee's Due Date and paid to Lessee within thirty (30) days thereof.

**Renewal Term(s)**

One or more Renewal Terms of the Agreement commencing upon expiration of the Initial Term.

**Repeated Service Disruption**

The simultaneous unavailability of the Redundant Paths of the Leased Infrastructure, for any period of time, due to a problem with the Leased Infrastructure.

**Service Drop.**

An extension of the Backbone to a location desired only by this Lessee, paid for by this Lessee and used only by this Lessee. A Service Drop may be requested by Lessee pursuant to Exhibit 10. If the City agrees to construct the Service Drop, that Service Drop shall be constructed by the City at Lessee's sole expense. Lessee shall have the exclusive right of use of that Service Drop



**Telecommunications**

Generating, acquiring, storing, transforming, processing, retrieving, utilizing, transmitting or making available information, whether on a common carrier, private carrier, or other basis, and whether or not subject to certification or regulation by any governmental entity.

**Termination Payment**

That payment made by Lessee in order to terminate this Agreement for convenience, which payment is a percentage of the remaining Lease Payments that would be paid by the Lessee (without any future CPI adjustments) under the Terms of the Agreement.

**Term**

The Effective Date until the date on which this Agreement, including any Renewal Terms, terminates.

**Tube**

A physical grouping of twelve (12) fibers within a cable.

**Verification Testing**

Testing performed by the City on an existing portion of the Fiber Optic Infrastructure, to ensure that the performance of said portion meets the requirements set forth in Exhibit 7.

**CITY OF SANTA CLARA FIBER LEASE**

**NVIDIA CORPORATION**

*Please note: Confidential Exhibits 2, 3, 4, 5 ,8, and 9 are removed. While the majority of the Agreement will be maintained as public record, specific term and pricing provisions are confidential and are available for council review in the Office of the City Clerk.*

**NVIDIA CORPORATION  
EXHIBIT 6**

**Notice of Completion and Notice of Acceptance/Rejection**

**NOTICE OF COMPLETION**

This Notice of Completion is issued pursuant to that Lease Agreement dated \_\_\_\_\_, 2008 (the "Agreement") by and Between the City of Santa Clara and NVIDIA Corporation ("Lessee"). This Notice of Completion is dated \_\_\_\_\_ and hereby notifies Lessee that the following items of the Leased Infrastructure identified as follows:

\_\_\_\_\_  
\_\_\_\_\_  
are complete and available for acceptance testing by Lessee.

Please take notice that if Lessee desires to perform Acceptance Testing, it must do so in accordance with Section 4.2 of the Agreement

Signed by Authorized Representative: \_\_\_\_\_  
Type Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

**NOTICE OF ACCEPTANCE/REJECTION**

The following items of the Leased Infrastructure are hereby accepted by Lessee as in compliance with the Acceptance Testing:

\_\_\_\_\_  
The following items of the Leased Infrastructure are found not in compliance with the Acceptance Testing and are not accepted by Lessee: \_\_\_\_\_ and comprise \_\_\_\_\_ percent of the total Leased Infrastructure that are the subject of this Notice of Completion.

Briefly describe the condition which is the basis for your claim that said portions of the Leased Infrastructure are not in compliance:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signed by Authorized Representative: \_\_\_\_\_  
Type Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

**NVIDIA CORPORATION**  
**EXHIBIT 7**  
**FIBER SPECIFICATIONS, PERFORMANCE**  
**STANDARDS AND ACCEPTANCE TESTING**

**1.0 CONFIGURATION**

Lessor's communications cable plant consists of single mode fiber optic cable, Attachment Points, Lateral Extensions and some Building Entrances at locations throughout the City of Santa Clara.

**2.0 FIBER OPTIC CABLE**

- 2.1 Fiber optic cable is run continuously without splices, except for specified splice and slack storage points.
- 2.2 Fiber optic cable is of suitable manufacture to provide long-term reliable service in a flooded underground ductbank or aerial outside environment.

**3.0 PERFORMANCE**

- 3.1 Optical Fiber Performance and Parameters:
  - 3.1.1 Fiber construction shall be single-mode -The core/cladding size shall be nominal 9/125 $\mu$ m.
  - 3.1.2 Fiber shall be of a dual-window construction with transmission capabilities at 1310nm and 1550nm.
  - 3.1.3 The numerical aperture (NA) of each fiber shall be 0.12.
  - 3.1.4 The maximum attenuation of each fiber shall be 0.35 dB / km at 1310 nanometers (nm), and 0.25dB / km at 1550 nm. In certain underground locations Low Water Peak fiber cable has been installed to provide additional optimized use in the 1385 nm region. Maximum attenuation of the Low Water Peak fiber shall be 0.40dB / km at 1310 nm, 0.35 dB / km at 1385 nm and 0.25dB / km at 1550 nm.
  - 3.1.5 Each fiber within a cable must be color coded with distinct and recognizable colors. Based on SVP preference, color coding and identification or numbering system will be assigned for each leased bundle of 12 strands within each applicable ring.
  - 3.1.6 Where required, each fiber shall either be terminated with an SC-type 2.5mm bayonet connector, or spliced to an SC-type 2.5mm bayonet connector pigtail. The nominal loss of the connector termination shall not exceed 0.60 dB.

- 3.1.7 Where required, each fiber will be fusion spliced. The measured loss of each completed strand splice shall be less than 0.15 dB per splice
- 3.2 Mechanical and Environmental Conditions for the Fiber Optic Cable:
- 3.2.1 The cable shall be able to withstand a short-term longitudinal load (during installation) of not less than 2700N (608 lbs.) with maximum elongation of less than 0.5%. The cable shall be able to withstand a long-term longitudinal load of not less than 890N (200 lbs.).
- 3.2.2 The minimum static or no load (0-130 lbs.) bending radius for the cable shall be no less than ten (10) times the cable diameter. The minimum dynamic or loaded (131-600 lbs.) bending radius shall be no less than twenty (20) times the cable diameter. The cable shall be able to withstand being flexed at the minimum static bending radius +/- 90 degrees for at least 20 cycles at 20-40 cycles per minute at 20 degrees C.]
- 3.2.3 The cable shall be able to withstand twisting of +/-360 degrees over a length of 2 meters for at least 10 cycles at 10 cycles per minute.
- 3.2.4 The cable shall exhibit stable performance characteristics in storage or service over a temperature range of -40 degrees C to +70 degrees C.
- 3.2.5 The cable shall withstand a compressive force of 435N/cm (250 lbs./in), and exhibit no increase in attenuation after the force is removed.
- 3.2.6 The cables shall be suitable for underground installation in an enclosed ductbank or an overhead self supporting or strand-supported installation. Cable shall be flooded with a suitable water-repellent compound, or otherwise constructed in such a manner to inhibit deterioration of performance due to duct flooding.
- 3.3 Fiber Optic Cable Structure:
- 3.3.1 A minimum of twenty-four fibers shall be in each cable, as designated on the plans. The cable structure shall be such that the fibers are grouped for easy handling. The individual fibers or buffer tubes shall be color-coded for ease of identification.
- 3.3.2 The cable shall contain appropriate dielectric strength members to satisfy the above mechanical and environmental specifications.
- 3.3.3 The cable core shall consist of fibers enclosed in filled loose buffer tubes, arranged around a central dielectric strength member. The interstices between the buffer tubes shall be filled with a suitable water-repellent compound to inhibit intrusion and migration of moisture along the cable.

- 3.3.4 The cable shall be enclosed in a jacket acceptable for use in an underground duct or aerial self supporting application environment.
- 3.4 Each span of fiber optic cable is to be installed as a single run of cable, using appropriate pulling techniques as necessary. No splices are to be made in any fiber optic cable, except as noted on the prints and at the termination of the cable in each communications room or pedestal.
- 3.5 Packaging and Shipping: Each length of cable shall have both ends effectively sealed. Individual fibers in each cable to be delivered must be tested before shipping to verify their conformance with the performance specifications.
- 3.6 Acceptable Manufacturers:  
Equivalent to Alcatel Color Lock, Single Mode, Optical Fiber  
  
[Overhead fiber is EZSpan ADSS; Underground fiber is EZ Prep Loose Tube Cable]

#### **4.0 INSTALLATION AND OPERATION**

- 4.1 Lessor shall coordinate all scheduled or emergency maintenance operations with Lessee's representative to insure that any interference or interruptions of Lessee's operations are anticipated and scheduled. Likewise, Lessee shall coordinate all scheduled or emergency maintenance operations with Lessor's representative to insure that any interference or interruption of Lessor's operations are anticipated and scheduled.
- 4.2 Lessor shall provide construction drawings applicable to Lessee's network construction, indicating all actual construction distances, variations from design, and other pertinent information upon delivery of the fiber.

#### **5.0 ACCEPTANCE TESTING**

##### **5.1 Acceptance Procedure**

Lessee's acceptance of the licensed fiber optic cable shall be based on conformance of the Dark Fiber Route (DFR) operation to the testing criteria as described herein. Prior to conduct of Lessee's Acceptance Tests, the Lessor shall test the transmission media for the acceptance of each individual strand and verify the integrity of the complete DFR ("Post-Construction Test" or "Verification Test", collectively "Lessor's Testing"). Upon completion of Lessor's Testing, Lessor shall notify Lessee in writing of the "completion of construction" and provide a Notice of Completion/Acceptance or Rejection form (Exhibit 6) for execution by the

Lessee, pursuant to the Acceptance Testing set forth in the Agreement to which this is an Exhibit.

## 5.2 Documentation

The Lessor shall make relevant drawings and documentation available to Lessee concurrent with the Notice of Completion.

## 5.3 Testing Support

Lessor will accommodate Lessor's request to participate in joint testing arrangements. Alternatively, Lessor may observe the conduct of Lessee's Acceptance Tests.

## 5.4 Testing and Measurement Equipment

The Lessor shall provide necessary testing equipment for performing the required Acceptance Tests, subject to review and concurrence by the Lessee. The authenticity and expiration date of the correct calibration data shall be verified by the Lessee. Lessor currently uses GNNetest for splicing and length.

## 5.5 Reports

Each party shall provide full test reports to the other party within two weeks of test completion, reflecting independent analysis and observations. For Lessor, any test must be provided to Lessee concurrently with a Notice of Completion (Exhibit 6). Test reports shall include a description of cable problems and testing failures, and necessary remedial actions.

## 5.6 Fiber Optic Cable Testing Procedures

### 5.6.1 Insertion Loss Testing:

5.6.1.1 An end-to-end attenuation test (including all connectors, fibers, and jumpers) shall be performed on all fiber strands by comparing the optical power at the input of a fiber with the output. This shall be accomplished by Insertion Loss Testing using a "one jumper reference" to include the connector losses. Testing shall be in accordance with EIA-455-53.

5.6.1.2 Tests shall be performed by using a transmitter and inserting a light signal, at 1310 and 1550 nanometers for single-mode fiber, in a "known" short (about 2 meters and less than 3 meters) jumper and placing a receiver or power meter at the other end of the jumper and measuring the

reference level in dBm and recording this as the "reference jumper".

- 5.6.1.2.1 Disconnect the receiver from the jumper and connect another jumper to the receiver and the reference jumper.
- 5.6.1.2.2 Measure the attenuation in dB and insure loss is less than 1 dB and record this loss as the test set loss.
- 5.6.1.2.3 Now disconnect the two jumpers from each other and connect to each end of the fiber to be tested
- 5.6.1.2.4 Testing shall be performed at 1310 and 1550 nanometers for single-mode fiber, using an attenuation or optical loss test set equivalent to GNNetest GN-6025/6250. The loss shall be calculated by subtracting the system loss from the reference loss (see below).

$$\text{Loss} = P_{\text{ref}} - P_{\text{sys}}$$

Where,

$P_{\text{ref}}$  = the level of the jumpers measured in dBm

$P_{\text{sys}}$  = the level of the jumpers plus the fiber being tested in dBm.

5.6.2 This tested actual loss value shall be compared to the theoretical loss calculated using the following attenuation criteria:

5.6.2.1 SC Type connectors (per mated pair):

Single-mode - 0.6 dB.

5.6.2.2 Fiber cable

Single-mode - 0.35/.40 (lwp) dB/km @ 1310nm  
0.25 dB/km @ 1550nm

5.6.2.3 It shall be the responsibility of the Lessee to independently calculate the theoretical loss using installed cable lengths.

5.6.3 If the actual loss exceeds the theoretical loss by greater than 1.0dB, the fiber shall be considered as having not passed the acceptance criteria. Lessor shall perform one of the following activities based on the requirements of the system and project schedules

5.6.3.1 Re-test using optical time-domain reflectometer (OTDR) testing as described below.

5.6.3.2 Properly isolate the fiber from use in the system.



#### 5.6.3.3 Cause replacement of the defective fiber optic cable

- 5.6.4 All cables will have been previously tested with an OTDR upon installation and acceptance by the Licensor. These records will be made available to and may suffice as record of proof of performance for Lessee.
- 5.6.5 All cables that fail the continuity or the insertion loss tests shall be re-tested using an optical time-domain reflectometer. OTDR testing may also be performed by the Lessee, the Lessor, or both as the utilization of the cable is transferred from the Lessor to the Lessee
- 5.6.6 These tests shall be used to disclose irregularities, if any, and their location caused from manufacture, handling, or installation such as discontinuities and micro-bendings.

# NVIDIA CORPORATION

## EXHIBIT 10 WORK ORDER REQUEST FORM (CONFIDENTIAL) [FOR WORK TO BE PERFORMED BY CITY]

This Request Form is submitted on behalf of **NVIDIA Corporation**, the lessee (the "Lessee") under that certain Lease Agreement by and between the City of Santa Clara, California (the "City") and Lessee dated as of \_\_\_\_\_, 2009 (the "Agreement"). Lessee hereby requests that the City provide Additional Attachment Points, Fibers, Service Drops, or Backbone Extensions, as indicated below. The person signing on behalf of Lessee has authority to bind Lessee. Provided that this Request Form is signed on behalf of the City and returned to Lessee on or before \_\_\_\_\_, then this document shall amend the Agreement as herein provided without the necessity of any further action by either party. If this document is not signed on behalf of the City and returned to Lessee by the date referenced in the preceding sentence, then this Request Form shall be null and void unless an extension is granted in writing by Lessee.

---

### Attachment Points

Lessee requests that the City provide Lessee with Attachment Points at the following locations:

<u>Intersection Description</u>	<u>Box Number</u>	<u>No. of Fibers</u> <u>To attach</u>	<u>Est. Cost</u> <u>(Add 15 %)</u>	<u>Est. Completion</u>
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### Additional Fiber

Lessee hereby requests that it be permitted to lease Additional Leaseable Fiber at the following locations:

<u>No. of Fibers</u>	<u>General Intersection</u> <u>Location</u>	<u>Node to Node</u>	<u>Price Per Exhibit 5</u>	<u>Est. Completion</u>
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### Service Drops

Lessee requests that the City construct a Service Drop for Lessee at the following locations:

<u>Intersection Description</u>	<u>Box Number</u>	<u>No. of Fibers</u>	<u>Est. Cost</u> <u>(Add 15 %)</u>	<u>Est. Completion</u>
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- 1.
  - 2.
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  - 4.
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**Backbone Extensions**

Lessee requests that City consider extending its backbone and lease portions of that extension to Lessee, in the following locations:

Describe the general path by Street name and intersections. State the number of fibers Lessee will lease.

---

**Lateral Extensions**

Lessee requests that the City construct a Lateral Extension at the following locations:

<u>Street Address</u>	<u>Tenant Name</u>	<u>No. of Fibers</u>	<u>Est. Cost</u> (Add 15 %)	<u>Est. Completion</u>
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Add an additional page if necessary.

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**Building Entrance**

Lessee requests that the City obtain Building Entrance at the following locations:

<u>Street Address</u>	<u>Tenant Name</u>	<u>No. of Fibers</u> <u>to Enter</u>	<u>Est. Cost</u> (Add 15 %)	<u>Est. Completion</u>
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Add an additional page if necessary.

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By their signatures below, Lessee and the City agree that the Agreement is amended as per the terms set forth above, effective as of the date this Request Form is signed by the City (subject to the time limitation set forth above). City will use its commercially reasonable efforts to meet the estimated completion dates above, however, Lessee understands and agrees that the estimated completion dates are estimated dates, and not guaranteed by City

**NVIDIA CORPORATION,  
a Delaware corporation**

**CITY OF SANTA CLARA, CALIFORNIA,  
a chartered California municipal corporation**

By: Ranga Jayaraman  
Title: Chief Information Officer

By: John C. Roukema  
Electric Utility Director

Address: 2701 San Tomas Expressway  
Santa Clara, California 95050  
Telephone: (408) 486-2000  
Fax: (408) 486-2200

1500 Warburton Avenue  
Santa Clara, California 95050  
Telephone: (408) 261-5292  
Fax: (408) 249-0217

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

**"Lessee"**

**"City"**

IF COUNCIL APPROVAL IS NECESSARY, THE FOLLOWING SIGNATURES MUST BE OBTAINED IN ORDER FOR THIS TO BE A VALID AND BINDING AMENDMENT TO THE AGREEMENT:

Approved as to form:

\_\_\_\_\_  
HELENE L. LEICHTER  
City Attorney

By: \_\_\_\_\_  
JENNIFER SPARACINO  
City Manager

Attest:

1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408) 615-2210  
Fax: (408) 241-6771

\_\_\_\_\_  
ROD DIRIDON, JR.  
City Clerk

**CITY OF SANTA CLARA**  
**AGENDA MATERIAL ROUTE SHEET**

Council Date: January 13, 2009

**SUBJECT:** Approval of Fiber Lease Agreement with Nvidia Corporation for Long Term Fiber Optics

**CERTIFICATION**

The proposed Fiber Lease Agreement with Nvidia Corporation

Regarding: Long Term Lease of Dark Fiber Optics

has been reviewed and is hereby certified.

**PUBLICATION REQUIRED:**

The attached Notice/Resolution/Ordinance is to be published \_\_\_\_ time(s) at least \_\_\_\_ days before the scheduled meeting/public hearing/bid opening/etc., which is scheduled for \_\_\_\_\_, 2008.

**AUTHORITY SOURCE FOR PUBLICATION REQUIREMENT:**

**Federal Codes:**

Title \_\_\_\_\_ U.S.C. § \_\_\_\_\_  
(Titles run 1 through 50)

**California Codes:**

Code \_\_\_\_\_ § \_\_\_\_\_  
(i.e., Government, Street and Highway, Public Resources)

**Federal Regulations:**

Title \_\_\_\_\_ C.F.R. § \_\_\_\_\_  
(Titles run 1 through 50)

**California Regulations:**

Title \_\_\_\_\_ California Code of Regulations § \_\_\_\_\_  
(Titles run 1 through 28)

City  
City Charter § \_\_\_\_\_ (i.e., 1310. Public Works Contracts. Notice published at least once at least ten days before bid opening)  
City Code § \_\_\_\_\_

1. As to City Functions, by

John C. Roukema  
Department Head

2. As to Legality, by

Lindsay Speck HL  
City Attorney's Office/CAO Assignment No. 08.1743

3. As to Environmental  
Impact Requirements, by

\_\_\_\_\_  
Director of Planning and Inspection

4. As to Substance, by

J. Sparacino  
City Manager

Revision Date: June 7, 2005